Case No. _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE ADOBE SYSTEMS, INC.,
APPLE, INC., GOOGLE, INC., and INTEL CORP.

ADOBE SYSTEMS, INC., APPLE INC., GOOGLE INC., and INTEL CORP., Defendants-Petitioners,
v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent,

MICHAEL DEVINE, MARK FICHTNER, SIDDHARTH HARIHARAN, BRANDON MARSHALL, and DANIEL STOVER,
Plaintiffs-Real Parties in Interest.

From the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

PETITION FOR WRIT OF MANDAMUS

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Adobe Systems, Inc. submits the following corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1: (1) Adobe is a publicly held corporation; (2) Adobe does not have any parent corporation; and (3) no publicly held corporation owns ten percent or more of Adobe's stock.

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INTRODUCTION

The district court committed clear legal error by creating an unprecedented and rigid test for preliminary settlement approval in class actions, and then using that test to reject a $324.5 million cash settlement reached after months of vigorous arm's-length negotiation among experienced counsel aided by the mediation services of a highly regarded former federal judge. There was no suggestion that the settlement was collusive; indeed, it was the highest settlement ever in an employment antitrust case and satisfied any preliminary approval test ever articulated by any federal court. But the court nonetheless refused to grant preliminary approval, because it deemed the settlement to be 16% lower than a "benchmark" supposedly set by earlier settlements by different defendants under entirely different circumstances. This formulaic approach to the parties' settlement contravenes *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), where this Court explained that it "put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and [has] never prescribed a particular formula by which that outcome must be tested." *Id.* at 965.

The district court's benchmark formula impermissibly substituted the court's assessment of the value of the case for that of the parties who have been litigating the case for more than three years, and in particular plaintiffs' counsel, who were "sobered" by the "very real risks" faced at trial after devoting "a lot of work

product" to analyzing the case and conducting jury research and other "empirical work"—none of which the district court had access to. 6/19/14 Tr. 25:4-17, 75:1-5, 75:15-21. The district court dismissed the parties' analysis of the trial risks, suggesting that, unless the settlement was larger, the court had—in its own words—"wasted years on this case." *Id*. at 74:25. This too directly contradicts *Rodriguez*, which held that "'[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" 563 F.3d at 967 (alteration in original) (citation omitted).

The proper standard for preliminary approval of class settlements is an important issue of first impression on which this Court's guidance is urgently needed. The court below acknowledged the "relatively scant appellate authority regarding the standard." Dkt. 974 ("Op.") at 5:23-25. In fact, this Court has never articulated the standard governing preliminary approval, and has no ready means of addressing this interlocutory issue except through mandamus. Because the order is not appealable, mandamus is the parties' only avenue of relief in order to avoid clear and irreparable damage. *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1065-66 (9th Cir. 2007).

The district court's stunning decision has attracted substantial national media attention. The decision forces plaintiffs to seek to obtain a unanimous jury verdict

and a damages award exceeding $324.5 million—even though their jury research tells them there is a very real chance that they and the absent class members will receive nothing. And it forces defendants to abandon the bargain they reached with highly qualified class counsel and instead either pay at least an additional $55.5 million to settle the case or proceed to trial. This Court should therefore issue the writ because, without mandamus, this fundamentally erroneous ruling will evade appellate review, irreparably harm plaintiffs, absent class members, and defendants, and make it significantly more difficult for parties to settle class actions in future cases.

BACKGROUND

Plaintiffs allege that defendants (Pixar, Lucasfilm, Apple, Adobe, Google, Intuit, and Intel) entered into an illegal conspiracy not to "cold-call" each other's technical employees, and seek treble damages under federal and state antitrust laws. Plaintiffs do not allege that the defendants agreed not to *hire* one another's employees. Rather, the alleged conspiracy comprised only six two-party "do-not-cold-call" agreements; and no defendant was involved in more than three, so that most employees had unlimited access to cold calls from most other defendants.

After initially denying class certification in April 2013 without prejudice (Dkt. 382), the court granted certification in October 2013 after plaintiffs narrowed their class definition to "technical employees" (Dkt. 531). While plaintiffs' second

certification motion was pending, plaintiffs settled with Lucasfilm and Pixar for $9 million, and with Intuit for $11 million (Dkts. 501, 540), which the court approved (Dkt. 540).

The district court has since denied defendants' summary judgment motions (Dkt. 771) and granted in part and denied in part defendants' motions to exclude plaintiffs' expert testimony (Dkt. 788). Trial was set for May 27, 2014. Dkt. 388.

In May 2014, after months of vigorous arm's-length negotiations, plaintiffs executed a settlement agreement with the remaining defendants. Dkt. 921 ¶ 10. The agreement (Dkt. 921 Ex.1) resolves all remaining claims in exchange for $324,500,000, to be paid directly to all identified class members. Plaintiffs termed this "the second largest settlement of employee class action claims in history" and "(by far) the largest recovery ever achieved in an employee class action bringing claims under the antitrust laws, on either an aggregate or net per class member basis." Dkt. 938, at 2:12-15. Plaintiffs were required to seek preliminary approval of the settlement by the district court, after which the class would be notified and invited to comment on or object to the settlement before the court finally approved the settlement. *See Rodriguez*, 563 F.3d at 957-58.

On June 19, 2014, the district court held a hearing to consider plaintiffs' motion for preliminary approval of the settlement. Dkts. 920, 948. During the hearing, plaintiffs explained they had "done jury testing," through which they

"f[ou]nd out what jurors think about this evidence, what jurors think about these class members, what jurors think about certain themes that are in this case." 6/19/14 Tr. 24:23-25:3. The results of the jury testing cast serious doubt on the viability of plaintiffs' claims at trial; counsel explained that "you have to be sobered when you do that kind of testing to understand that while you might have great evidence, you have to overcome a number of hurdles." *Id.* at 25:4-6.

Plaintiffs walked the court through "several" of these hurdles. 6/19/14 Tr. 25:7-17. "There is a risk that a jury might find that there was no overarching conspiracy"; "the jury might conclude that these workers are among the most desirable in the world and they had plenty of other opportunity to go other places besides these seven companies"; and jurors might not "like plaintiffs' damages model," or "think that it wasn't $3 billion," but "less than $1 billion," or "some small fraction." *Id*. at 26:21-27:9. Plaintiffs acknowledged the "risk that a jury, hearing a whole bunch of different experts, even as we think we have the best one, might come to a different perspective." *Id*. at 27:24-28:1. Plaintiffs thus explained that "[i]t is not without … great concern that we would ever take this case to trial." *Id*. at 64:2-3.

Plaintiffs also explained that they had analyzed "other cases that have been tried in this district recently where people got less than what we're getting as a percentage of exposure." 6/19/14 Tr. 28:12-14. "And the problem for us, as we

look at what's happened in other antitrust trials in the last decade, is that it's very, very tough." *Id.* at 25:15-17. Indeed, plaintiffs explained, in antitrust cases involving actual price-fixing agreements and criminal guilty pleas—neither of which were present here—plaintiffs have received tiny fractions of the damages they sought. *Id*. at 28:12-31:1; *see also* Dkt. 921 Exs. 4-5 (analysis of other jury awards).

Despite plaintiffs' grave concerns with their case, on August 8, 2014, the court denied preliminary approval of the settlement. Dkt. 974. The court admitted that "Class counsel have been zealous advocates for the Class." Op. 31:21; *see also* Dkt. 531, at 7:20-21 (class counsel "have vigorously prosecuted this action and will continue to do so"). But the court found that "the total settlement amount falls below the range of reasonableness" because, according to the court, "Class members recover less on a proportional basis from the instant settlement with Remaining Defendants than from the settlement with the Settled Defendants a year ago." Op. 6:21-7:2. The court reasoned that the "Remaining Defendants are alleged to have received 95% of the benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the Class in terms of lost compensation," and that, as a result, the "Remaining Defendants should have to pay at least 95% of the damages …." Op. 9:2-5. Because the court's novel and unsupported test and calculation purportedly required a settlement of "at least $380

million" (Op. 7:22 & n.8)—$55.5 million more than the parties agreed to—the court rejected the settlement.

ISSUE PRESENTED

Whether a district court can, at the preliminary approval stage, reject an arm's-length, non-collusive class action settlement reached by experienced counsel after extensive discovery, motions practice, and jury research, which exposed very real risks that compelled plaintiffs to settle their claims, because the court deems the settlement amount 16% too low based on a rigid and formulaic comparison with an earlier settlement.

RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the district court (1) to vacate its order denying preliminary approval of the $324.5 million settlement and (2) to enter an order granting preliminary approval.

LEGAL STANDARD

This Court weighs five factors in determining whether to grant a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1065-66 (9th Cir. 2007) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)) (internal quotation marks omitted). Not every element of the mandamus standard must be satisfied in order to warrant a writ. *Valenzuela–Gonzalez v. U.S. Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) ("all five factors need not be satisfied at once"). "Exercise of [the Court's] supervisory mandamus authority is particularly appropriate when an important question of law would repeatedly evade review because of the collateral nature of the issue." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304 (9th Cir. 1982).

ARGUMENT

I. The Preliminary Approval Standard Will Evade Appellate Review and Harm the Parties Absent Mandamus

It is beyond dispute that the issues presented by the district court's order denying preliminary approval will evade appellate review, and that the parties will be irreparably harmed, absent this Court's issuing a writ of mandate. These elements of the mandamus standards are therefore clearly established here.

Petitioners lack any other means to secure relief. The order denying preliminary approval is not a final judgment or otherwise appealable. And unlike evidentiary rulings and other orders that are reviewable once a final judgment is entered, there will never be an opportunity for a direct appeal of a district court's order denying preliminary approval of a settlement.

Moreover, if the court's errors are not corrected now, the $324.5 million settlement will be nullified and the resources spent in negotiating it will be wasted. Either the parties will proceed to trial—where either defendants or plaintiffs, including the absent class members, will lose—or defendants under the court's order will be forced to pay at least an additional $55.5 million above the record-setting amount they agreed to. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994) ("jeopardizing a settlement agreement causes prejudice to the existing parties to a lawsuit").

The prejudice to defendants would be particularly acute here, where the district court reached extensive "ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The court's comments expressing its view on hotly contested issues such as the supposed culpability of defendants and their executives (Op. 11-16) were widely reported in the press including on the front page of *The New York Times* (David Streitfeld, *Court Rejects Deal on Hiring in Silicon Valley*, N.Y. Times, Aug. 8, 2014, at A-1 (lede: "There is 'ample evidence' that Silicon Valley was engaged in 'an overarching conspiracy' against its own employees, a federal judge said on Friday, and it should either pay dearly or have its secrets exposed at trial")), threatening to taint the jury pool and prejudice defendants' ability to obtain a fair trial.

II. The District Court's New Preliminary Approval Standard Is Clearly Erroneous as a Matter of Law

The parties negotiated at arm's length for several months aided by an experienced mediator. Their efforts were informed by a fully developed evidentiary record, careful analysis of the risks of trial, and rigorous jury testing. From this process, the parties agreed to the highest recorded settlement amount of any employee class action under the antitrust laws. It was clearly erroneous for the district court to substitute its own judgment for the parties' agreement based on an unprecedented "benchmark" analysis. The error is magnified here, where the analysis is untethered to—and actually at odds with—plaintiffs' counsel's calculation of the class's likelihood of recovery.

A. The Court's Benchmark Standard for Preliminary Approval Is Clear Legal Error

This Court requires district courts at the *final* approval stage to "explore[] comprehensively all factors" in determining whether to approve a class action settlement, including:

> (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Rodriguez, 563 F.3d at 963-64 (citation and internal quotation marks omitted). This Court has never articulated the standard for *preliminary* approval of a class

settlement, but numerous district courts around the country have held that "[t]he standards for preliminary approval" of a class settlement "are not as stringent as those applied for final approval." *In re Crocs, Inc. Sec. Litig.*, 2013 WL 4547404, at *3 (D. Colo. Aug. 28, 2013); *see also Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008) ("the standard for preliminary approval is far less demanding" than the standard for final approval); Dkt. 920, at 14-15 (citing several cases). At the preliminary stage, district courts in this Circuit focus on whether a settlement agreement "was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel." *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013).

In undertaking the approval analysis, this Court has emphasized the "strong judicial policy that favors settlement, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). "[V]oluntary conciliation and settlement are the preferred means of dispute resolution," and "[t]his is especially true in complex class action litigation." *Officers for Justice*, 688 F.2d at 625.

The Court recognized in *Rodriguez* that, even in the context of more stringent *final* approval, "'[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" 563 F.3d at 967 (quoting *In re Pac. Enters. Sec.*

Litig., 47 F.3d 373, 378 (9th Cir. 1995)). Courts must "put a good deal of stock in the product of an arms-length, non-collusive negotiated resolution" and defer to a "private consensual decision of the parties." *Id.* at 965. The possibility "that the settlement could have been better ... does not mean the settlement presented was not fair, reasonable or adequate." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). As a result, a court's role in approving a settlement is not to demand the *best* or *highest* settlement amount; rather, review "*must be limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties" and is on the whole reasonable and fair. *Officers for Justice*, 688 F.2d at 625 (emphasis added).

District courts in this Circuit, following *Rodriguez*, have therefore "afforded a *presumption* of fairness and reasonableness [to] a settlement agreement where that agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel." *In re Netflix*, 2013 WL 1120801, at *4 (emphasis added); *see also City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement"). This presumption is particularly appropriate at the preliminary approval stage because class members will have an opportunity to

lodge objections before final approval.

No one has alleged any sort of collusion in agreeing to the settlement, yet the court improperly failed to presume the settlement was fair and reasonable. It was undisputed below that the settlement was "the result of years of hard-fought litigation and arm's length negotiations conducted by capable counsel with extensive experience in class action litigation" (Dkt. 938, at 2:6-8), and the objector specifically explained that he was not arguing that plaintiffs "got together with the defendants and entered into a collusive settlement" (6/19/14 Tr. 10:4-7). The court nonetheless disapproved the settlement based on a formula of its own creation that imposed a strict requirement that the settlements be somehow proportionate to earlier settlements by different defendants.[1] And the court's formula ignored that those defendants were jointly and severally liable for any judgment, with no right to contribution, so that a strict proportionality approach based on "liability shares" is especially misguided and unprincipled.

The court's rigid and formulaic approach to preliminary settlement approval unduly narrowed the "range of possible approval" (Manual for Complex Litigation

[1] The court appears to have adopted the recommendation of the objector, who asked the court to avoid the "historically ... deferential approach" of "postponing close scrutiny of proposed settlements until final approval," and instead because "this case is … highly visible[,] … take an active role in evaluating the merits of [the] proposed settlement[s] early in the process." Dkt. 934, at 7:10-22.

(3d) § 30.41 (1995)), and directly contravenes *Rodriguez*; indeed, no other federal appellate court has adopted the standard in the context of either preliminary or final approval. It is a clear error of law warranting mandamus review.

The court began by comparing the present settlement to an earlier settlement involving much smaller defendants (Op. 7 n.8), which, given their relative size, may have settled for an amount reflecting their anticipated litigation expenses rather than any measure of share or fault. The court improperly assumed the defendants were comparable, ignored joint and several liability, and brushed aside the developments that came later in the case and were unfavorable to plaintiffs' position. Instead, the court determined that the present defendants had agreed to pay proportionally less than the defendants that settled previously. Op. 6-7. Applying this unprecedented proportionality approach, the court concluded that the $324.5 million settlement fell outside the "range of reasonableness" because defendants "should, at a minimum, pay their fair share as compared to the Settled Defendants." Op. 6:11-20, 31:25.

The district court purportedly premised its formulaic test on a Pennsylvania district court decision (*In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014)), which in turn was based on cases holding that the "primary" or "most important" factor concerning the fairness of a settlement is "plaintiffs' expected recovery balanced against the value of the

settlement offer" (*In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). None of those decisions, however, involved any comparisons with other defendants' settlements.

Moreover, in *Rodriguez*, this Court specifically considered and rejected a formulaic approach, and reaffirmed that it has "*never* prescribed a particular formula" for approving settlements. 563 F.3d at 965 (emphasis added); *see also id.* ("[T]he factors we identify, are somewhat different [from *Synfuel*]. We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, … and have never prescribed a particular formula by which that outcome must be tested.") (citation omitted). As this Court has cautioned elsewhere, "that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974)).

"Settlement negotiation is an art more than a science" (*Ellis v. Midland Credit Mgmt., Inc.*, 2012 WL 4356251, at *5 (D. Colo. Sept. 24, 2012)), and involves a nuanced and delicate exercise of judgment that should not be second-guessed de novo by a court. But the district court here did just that, substituting a

formulaic test and the court's own view of the likely outcome at trial for the judgment of plaintiffs' counsel, whose "jury testing," "work product," and "empirical work" left counsel "sobered" by the "very, very real risks" faced at trial. 6/19/14 Tr. 25:4-17, 63:22-25, 75:1-5, 75:15-21. The court also nullified months of settlement negotiations directed by an experienced and respected mediator, former federal district judge Layn Phillips (Dkt. 921 ¶ 10), despite this Court's recognition of the value of an experienced mediator (*see Rodriguez*, 563 F.3d at 965-66), who helps ensure that settlement negotiations are "fair and conducted at arm's length" (*In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 221 (E.D.N.Y. 2013)).

The practical effect of the court's approach was to impose a variant of a "most favored nations" rule for prior settlements—even though the parties had not negotiated or come to such an agreement. Rather than entitling the prior-settling parties to refunds based on later settlements, the court's rule forces later-settling parties to essentially match the amounts agreed to in the earlier settlements. Most favored nations arrangements have been "disfavored because they often inhibit compromise and settlement." *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1203 (6th Cir. 1996); *see also* 4 *Newberg on Class Actions* § 12:2 (4th ed. 2014) ("most favored nations clauses are criticized in the Manual for Complex Litigation and are rarely included in most class settlement agreements").

And the imposition of a similar arrangement by a court falls entirely outside the proper judicial role: "[T]he power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986).

To make matters worse, the district court's calculation of the proportionality among the settlements was incorrect. The court reasoned that defendants "received 95% of the benefit … and … caused 95% of the harm." Op. 9:2-3. But plaintiffs' damages model actually shows that only 94.386% of the damages are payable to the present defendants' employees, so that even under the trial court's flawed methodology, the "appropriate benchmark settlement" would be $336.2 million, just slightly higher than the actual settlement amount. Dkt. 964-5, at 380 Ex. V.3 (setting out alleged damages payable to each defendant's employees). In addition, using the same formula, the *net* amount of the present settlement that will be paid to class members is proportionately *greater* than it was in the prior settlement, because the proportion of the previous settlement that was allotted for fees and expenses is significantly higher than in the present settlement. Dkt. 916, at 5 (granting $8.7 million, or more than 40%, of the $20 million total for fees and expenses). In substituting its formulaic calculation for the judgment of the parties, the court therefore not only committed legal error but also misapplied its own

erroneous standard. The court's mathematical errors highlight the fundamentally inappropriate nature of the court's formulaic methodology, given that very small changes in the inputs to the formula can mean the difference between approving and rejecting a settlement even if all the other factors overwhelmingly favor approval.

B. The Arm's-Length Settlement Reached by the Parties Is Reasonable and Should Be Given Preliminary Approval

Under a proper analysis, the settlement between the parties unquestionably should have received preliminary approval.

Two of the relevant factors in final settlement approval—the risk, expense, complexity, and likely duration of further litigation; and the extent of discovery completed and the stage of the proceedings (*Rodriguez*, 563 F.3d at 966-67)—weigh strongly in favor of approval, given how much time and resources had been devoted to the case, and the complex trial that lay ahead. The significant "experience … of counsel" also is indisputable. *Id.* at 963. And the fact that the settlement here "is in cash, not in kind" is a particularly "good indicator of a beneficial settlement." *Id.* at 965. That these factors are clearly established should have at the very least caused the district court to presume the settlement was reasonable, but the court accorded them no weight at all.

As to the strength of their case, plaintiffs acknowledged that to establish liability, much less obtain a $3 billion damages award, they "have to overcome a

number of hurdles." 6/19/14 Tr. 25:4-6. There is a significant risk that a jury would not link together six separate two-party "do-not-cold-call" agreements into one massive conspiracy, which is required by plaintiffs' damages model. There is also a risk that the jury would reject the only evidence in favor of the model: the testimony of a single expert who admits the results are not statistically significant. Plaintiffs' counsel explained that their jury research left them "sobered by … learning how difficult it is to convince a unanimous room of people … to meet the standard in this case." *Id*. at 75:3-5. Based on these and other significant litigation risks, plaintiffs determined that $324.5 million was a reasonable settlement figure.

The court gave no weight to plaintiffs' counsel's considered and good-faith acknowledgment of the "very, very real risks" plaintiffs faced. 6/19/14 Tr. 25:13-14. Rather, the court substituted its own view of the evidence, which the court believed supports plaintiffs' case. Op. 10-30. In so doing, the court disregarded the substantial weaknesses in plaintiffs' case, as well as plaintiffs' repeated explanation of their concerns based on, among other things, their confidential jury testing.

The court also determined that any risk plaintiffs faced going to trial "existed and was even greater when Plaintiffs settled with the Settled Defendants a year ago" (Op. 7), but there is no basis for this conclusion. The court reasoned that because the court had certified the class and denied summary judgment, "the

procedural posture of the case swung dramatically in Plaintiffs' favor after the initial settlements were reached." Op. 10:3-4. But this Court in *Rodriguez* counseled precisely the opposite; it approved the district court's determination that "successfully opposing … summary judgment did not mean that the class had established liability or would obtain a favorable, unanimous jury verdict." 563 F.3d at 964. The district court's contrary decision here was legal error.

Moreover, the district court ignored the serious weaknesses in plaintiffs' case identified by defendants. For example, plaintiffs do not allege any agreement on the level of employee compensation, nor do they even allege any agreement not to hire each other's employees; and plaintiffs allege no express agreement at all among all defendants. Rather, plaintiffs allege that seven defendants, through six alleged two-party agreements not to "cold-call" each other's employees, somehow conspired as one group to depress the wages of all their employees. Plaintiffs are correct that there is a "very real risk" that a jury would reject plaintiffs' theory.

In fact, at trial, if plaintiffs failed to prove that any *one* of the six agreements was not part of their alleged overarching conspiracy, defendants would avoid any damages whatsoever. Plaintiffs contend that the compensation of *every* technical employee at all seven companies was suppressed by about 10% each year of the class period, resulting in $3 billion in depressed wages. Dkt. 967-1, at 21 Fig. 7. Plaintiffs' expert's opinion arriving at the $3 billion figure was integrally premised

on the involvement of *all seven defendants* in the alleged conspiracy. Dkt. 564, at 13; Dkt. 938, at 11. As he acknowledged, if a single defendant was found not to be part of the conspiracy, his model could not calculate damages. Dkt. 569-14, at 1031:19-1032:14. With no damages model, plaintiffs would be unable to recover damages, let alone $3 billion, and would be unable to proceed with a class action. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013).

The district court also took it as a given that class certification was final and settled because the Ninth Circuit did not grant interlocutory review. Op. 10:8-20. But the court ignored the risk that defendants would prevail on appeal from class certification after final judgment. The district court's analysis was, again, directly contrary to *Rodriguez*. *See* 563 F.3d at 966 (although 23(f) petition had been denied, "[a]t the time of settlement, the risk remained that the nationwide class might be decertified").

Even plaintiffs acknowledged that "the issue of class certification is still an open issue on appeal." 6/19/14 Tr. 23:5-6. Courts of appeals have reversed the certification of a class even after judgment following trial. *See, e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 336-37 (4th Cir. 1998). Defendants would have strong arguments on appeal from the certification of a broad and disparate class of 60,000 technical employees ranging from Intel semiconductor design engineers in Massachusetts to Lucasfilm digital animators in

Silicon Valley. Plaintiffs' theory of antitrust impact depended on an unprecedented use of aggregate analyses and averages that were extrapolated class-wide, which several courts of appeals have rejected (*see, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253-55 (D.C. Cir. 2013)), and which were not even statistically significant (Dkt. 715, at 3). The risk that defendants ultimately would prevail on class certification therefore should have been considered as part of the *Rodriguez* analysis.

In essence, the district court considered what it perceived to be the strengths of plaintiffs' case, while ignoring the fact that *plaintiffs themselves* developed serious concerns about their evidence and legal theories based on a comprehensive view of the record and jury testing that post-dated the earlier settlements. Such a one-sided analysis clearly is not the required "comprehensive[]" "explor[ation of] all factors" that this Court requires. *Rodriguez*, 563 F.3d at 964 (citation omitted).

III. If Allowed to Stand, the Court's Decision on an Important Matter of First Impression Will Severely Hamper Class Settlement

This petition also presents a compelling case for mandamus review because important "issues of law of first impression" will completely evade review in the absence of a writ of mandate. *Douglas*, 495 F.3d at 1065-66.

The district court expressly acknowledged the "scant appellate guidance" (Op. 5:24) on the standard district courts should use to review preliminary approval motions. Plaintiffs "couldn't find a single circuit level decision where a court says

this is the standard that you, as a district court, are required to apply." 6/19/14 Tr. 11:15-18. This Court has never opined on the standards district courts are to use when deciding whether to grant preliminary approval of a settlement. As a result, the district courts in this Circuit, including the district court here, have been left to rely heavily on decisions from other district courts in determining how to evaluate class action settlements. Op. 5-6; *see also, e.g.*, *Christensen v. Hillyard, Inc.*, 2014 WL 3749523, at *3-4 (N.D. Cal. July 30, 2014).

Failing to review this ruling would create "new and important problems" warranting mandamus (*Douglas*, 495 F.3d at 1065-66), as the court's widely publicized benchmark methodology—if adopted elsewhere—will significantly hinder parties' ability to settle in future class actions. Class counsel who are looking to reach early settlements with fewer than all defendants to finance prosecution of the litigation will be forced to assume that the early settlements will create a floor below which they will not be allowed to settle with the remaining defendants. Defendants who do not settle early in the litigation will be bound against their will by the settlement decisions of their co-defendants. The court's rule thus restricts the ability of plaintiffs and defendants to reach negotiated settlements fully informed by the myriad factors that should guide the parties' decisionmaking.

In addition, courts considering whether to approve early settlements between

a class and fewer than all defendants will be forced to consider whether the resulting "benchmark settlement amount" for the remaining defendants would be sufficient to warrant later approval by the court. If it would not, the court might conclude that the early settlement, for that reason alone, was not in the best interest of the class and therefore refuse to approve it.

These results will deter class settlement and disrupt the efforts of class counsel to finance complex litigation. The decision below has received unusually widespread publicity,[2] and certainly has come to the attention of district courts and the class settlement objectors' bar. This Court's review is therefore critical to ensure that class settlement remains a viable option for parties in order to resolve complex class actions in a fair and efficient manner.

CONCLUSION

This petition presents an issue of first impression that is vital to the civil justice system's ability to resolve aggregated claims. The district court's rejection

[2] *E.g.*, David Streitfeld, *Court Rejects Deal on Hiring in Silicon Valley*, N.Y. Times, Aug. 8, 2014, at A-1 ("'I cannot recall a judge saying in a class-action case that the amount of settlement is too low and you need to go back and go for broke at trial,' said Daniel Crane, who teaches antitrust law at the University of Michigan Law School. 'This is very striking.'"); Jeff Elder, *Judge Rejects Settlement in Silicon Valley Wage Case*, Wall St. J., Aug. 8, 2014, http://online.wsj.com/articles/judge-rejects-settlement-in-silicon-valley-wage-case-1407528633; Chris O'Brien, *Deal is rejected in tech hiring case*, L.A. Times, Aug. 9, 2014, at 4; Kristen V. Brown, *She lays down law to tech's giants*, S.F. Chron., Aug. 10, 2014, at A-1; Brandon Bailey, *Judge Orders Tech Giants to Fatten Offer*, San Jose Mercury News, Aug. 9, 2014, at 1-A.

of the settlement was clear error as a matter of law. The district court applied a mechanical formula that overrode sensitive judgments of the class's own counsel based on confidential information regarding the serious risks posed by their claims and their chances of success at trial. The ruling will inflict significant harm on all parties and the class action procedure. Absent mandamus, this controversial and erroneous ruling will evade review. This Court should grant the petition.

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.

STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pending in this circuit.

CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is O'Melveny & Myers LLP, Two Embarcadero Center, 28th Floor, San Francisco, CA 94111.

On September 4, 2014, I served the following document(s):

PETITION FOR WRIT OF MANDAMUS

by transmitting on this date via Email and/or U.S. Mail a true and correct copy of the above referenced documents.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 4, 2014, at San Francisco, California.

/s/ Michael O'Donnell
Michael O'Donnell

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH ADOBE, APPLE, GOOGLE, AND INTEL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: **ALL ACTIONS**	Case No.: 11-CV-02509-LHK ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH ADOBE, APPLE, GOOGLE, AND INTEL

Before the Court is a Motion for Preliminary Approval of Class Action Settlement with Defendants Adobe Systems Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), and Intel Corp. ("Intel") (hereafter, "Remaining Defendants") brought by three class representatives, Mark Fichtner, Siddharth Hariharan, and Daniel Stover (hereafter, "Plaintiffs"). *See* ECF No. 920. The Settlement provides for $324.5 million in recovery for the class in exchange for release of antitrust claims. A fourth class representative, Michael Devine ("Devine"), has filed an Opposition contending that the settlement amount is inadequate. *See* ECF No. 934. Plaintiffs have filed a Reply. *See* ECF No. 938. Plaintiffs, Remaining Defendants, and Devine appeared at a hearing on June 19, 2014. *See* ECF No. 940. In addition, a number of Class members have submitted letters in

support of and in opposition to the proposed settlement. ECF Nos. 914, 949-51. The Court, having considered the briefing, the letters, the arguments presented at the hearing, and the record in this case, DENIES the Motion for Preliminary Approval for the reasons stated below.

I. BACKGROUND AND PROCEDURAL HISTORY

Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover, individually and on behalf of a class of all those similarly situated, allege antitrust claims against their former employers, Adobe, Apple, Google, Intel, Intuit Inc. ("Intuit"), Lucasfilm Ltd. ("Lucasfilm"), and Pixar (collectively, "Defendants"). Plaintiffs allege that Defendants entered into an overarching conspiracy through a series of bilateral agreements not to solicit each other's employees in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. Plaintiffs contend that the overarching conspiracy, made up of a series of six bilateral agreements (Pixar-Lucasfilm, Apple-Adobe, Apple-Google, Apple-Pixar, Google-Intuit, and Google-Intel) suppressed wages of Defendants' employees.

The five cases underlying this consolidated action were initially filed in California Superior Court and removed to federal court. *See* ECF No. 532 at 5. The cases were related by Judge Saundra Brown Armstrong, who also granted a motion to transfer the related actions to the San Jose Division. *See* ECF Nos. 52, 58. After being assigned to the undersigned judge, the cases were consolidated pursuant to the parties' stipulation. *See* ECF No. 64. Plaintiffs filed a consolidated complaint on September 23, 2011, *see* ECF No. 65, which Defendants jointly moved to dismiss, *see* ECF No. 79. In addition, Lucasfilm filed a separate motion to dismiss on October 17, 2011. *See* ECF No. 83. The Court granted in part and denied in part the joint motion to dismiss and denied Lucasfilm's separate motion to dismiss. *See* ECF No. 119.

On October 1, 2012, Plaintiffs filed a motion for class certification. *See* ECF No. 187. The motion sought certification of a class of all of the seven Defendants' employees or, in the alternative, a narrower class of just technical employees of the seven Defendants. After full briefing and a hearing, the Court denied class certification on April 5, 2013. *See* ECF No. 382. The Court was concerned that Plaintiffs' documentary evidence and empirical analysis were

insufficient to determine that common questions predominated over individual questions with respect to the issue of antitrust impact. *See id.* at 33. Moreover, the Court expressed concern that there was insufficient analysis in the class certification motion regarding the class of technical employees. *Id.* at 29. The Court afforded Plaintiffs leave to amend to address the Court's concerns. *See id.* at 52.

On May 10, 2013, Plaintiffs filed their amended class certification motion, seeking to certify only the narrower class of technical employees. *See* ECF No. 418. Defendants filed their opposition on June 21, 2013, ECF No. 439, and Plaintiffs filed their reply on July 12, 2013, ECF No. 455. The hearing on the amended motion was set for August 5, 2013.

On July 12 and 30, 2013, after class certification had been initially denied and while an amended motion was pending, Plaintiffs settled with Pixar, Lucasfilm, and Intuit (hereafter, "Settled Defendants"). *See* ECF Nos. 453, 489. Plaintiffs filed a motion for preliminary approval of the settlements with Settled Defendants on September 21, 2013. *See* ECF No. 501. No opposition to the motion was filed, and the Court granted the motion on October 30, 2013, following a hearing on October 21, 2013. *See* ECF No. 540. The Court held a fairness hearing on May 1, 2014, ECF No. 913, and granted final approval of the settlements and accompanying requests for attorneys' fees, costs, and incentive awards over five objections on May 16, 2014, ECF Nos. 915-16. Judgment was entered as to the Settled Defendants on June 20, 2014. ECF No. 947.

After the Settled Defendants settled, this Court certified a class of technical employees of the seven Defendants (hereafter, "the Class") on October 25, 2013 in an 86-page order granting Plaintiffs' amended class certification motion. *See* ECF No. 532. The Remaining Defendants petitioned the Ninth Circuit to review that order under Federal Rule of Civil Procedure 23(f). After full briefing, including the filing of an amicus brief by the National and California Chambers of Commerce and the National Association of Manufacturing urging the Ninth Circuit to grant review, the Ninth Circuit denied review on January 15, 2014. *See* ECF No. 594.

Meanwhile, in this Court, the Remaining Defendants filed a total of five motions for summary judgment and filed motions to strike and to exclude the testimony of Plaintiffs' principal

expert on antitrust impact and damages, Dr. Edward Leamer, who opined that the total damages to the Class exceeded $3 billion in wages Class members would have earned in the absence of the anti-solicitation agreements.[1] The Court denied the motions for summary judgment on March 28, 2014, and on April 4, 2014, denied the motion to exclude Dr. Leamer and denied in large part the motion to strike Dr. Leamer's testimony. ECF Nos. 777, 788.

On April 24, 2014, counsel for Plaintiffs and counsel for Remaining Defendants sent a joint letter to the Court indicating that they had reached a settlement. *See* ECF No. 900. This settlement was reached two weeks before the Final Pretrial Conference and one month before the trial was set to commence.[2] Upon receipt of the joint letter, the Court vacated the trial date and pretrial deadlines and set a schedule for preliminary approval. *See* ECF No. 904. Shortly after counsel sent the letter, the media disclosed the total amount of the settlement, and this Court received three letters from individuals, not including Devine, objecting to the proposed settlement in response to media reports of the settlement amount.[3] *See* ECF No. 914. On May 22, 2014, in accordance with this Court's schedule, Plaintiffs filed their Motion for Preliminary Approval. *See* ECF No. 920. Devine filed an Opposition on June 5, 2014.[4] *See* ECF No. 934. Plaintiffs filed a Reply on June 12, 2014. *See* ECF No. 938. The Court held a hearing on June 19, 2014. *See* ECF No. 948. After the hearing, the Court received a letter from a Class member in opposition to the proposed settlement and two letters from Class members in support of the proposed settlement. *See* ECF Nos. 949-51.

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[1] Dr. Leamer was subject to vigorous attack in the initial class certification motion, and this Court agreed with some of Defendants' contentions with respect to Dr. Leamer and thus rejected the initial class certification motion. *See* ECF No. 382 at 33-43.

[2] Defendants' motions in limine, Plaintiffs' motion to exclude testimony from certain experts, Defendants' motion to exclude testimony from certain experts, a motion to determine whether the per se or rule of reason analysis applied, and a motion to compel were pending at the time the settlement was reached.

[3] Plaintiffs in the instant Motion represent that two of the letters are from non-Class members and that the third letter is from a Class member who may be withdrawing his objection. *See* ECF No. 920 at 18 n.11. The objection has not been withdrawn at the time of this Order.

[4] Devine stated in his Opposition that the Opposition was designed to supersede a letter that he had previously sent to the Court. *See* ECF No. at 934 n.2. The Court did not receive any letter from Devine. Accordingly, the Court has considered only Devine's Opposition.

II. LEGAL STANDARD

The Court must review the fairness of class action settlements under Federal Rule of Civil Procedure 23(e). The Rule states that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The Rule requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal" and further states that if a settlement "would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)-(2). The principal purpose of the Court's supervision of class action settlements is to ensure "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

District courts have interpreted Rule 23(e) to require a two-step process for the approval of class action settlements: "the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the Ninth Circuit has stated that "[a]ssessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

In contrast to these well-established, non-exhaustive factors for final approval, there is relatively scant appellate authority regarding the standard that a district court must apply in reviewing a settlement at the preliminary approval stage. Some district courts, echoing commentators, have stated that the relevant inquiry is whether the settlement "falls within the range of possible approval" or "within the range of reasonableness." *In re Tableware Antitrust Litig.*, 484

F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also Cordy v. USS-Posco Indus.*, No. 12-553, 2013 WL 4028627, at *3 (N.D. Cal. Aug. 1, 2013) ("Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval." (internal quotation marks omitted)). To undertake this analysis, the Court "must consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014) (internal quotation marks omitted).

III. DISCUSSION

Pursuant to the terms of the instant settlement, Class members who have not already opted out and who do not opt out will relinquish their rights to file suit against the Remaining Defendants for the claims at issue in this case. In exchange, Remaining Defendants will pay a total of $324.5 million, of which Plaintiffs' counsel may seek up to 25% (approximately $81 million) in attorneys' fees, $1.2 million in costs, and $80,000 per class representative in incentive payments. In addition, the settlement allows Remaining Defendants a pro rata reduction in the total amount they must pay if more than 4% of Class members opt out after receiving notice.[5] Class members would receive an average of approximately $3,750[6] from the instant settlement if the Court were to grant all requested deductions and there were no further opt-outs.[7]

The Court finds the total settlement amount falls below the range of reasonableness. The Court is concerned that Class members recover less on a proportional basis from the instant

[5] Plaintiffs also assert that administration costs for the settlement would be $160,000.

[6] Devine calculated that Class members would receive an average of $3,573. The discrepancy between this number and the Court's calculation may result from the fact that Devine's calculation does not account for the fact that 147 individuals have already opted out of the Class. The Court's calculation resulted from subtracting the requested attorneys' fees ($81,125,000), costs ($1,200,000), incentive awards ($400,000), and estimated administration costs ($160,000) from the settlement amount ($324,500,000) and dividing the resulting number by the total number of remaining class members (64,466).

[7] If the Court were to deny any portion of the requested fees, costs, or incentive payments, this would increase individual Class members' recovery. If less than 4% of the Class were to opt out, that would also increase individual Class members' recovery.

settlement with Remaining Defendants than from the settlement with the Settled Defendants a year ago, despite the fact that the case has progressed consistently in the Class's favor since then. Counsel's sole explanation for this reduced figure is that there are weaknesses in Plaintiffs' case such that the Class faces a substantial risk of non-recovery. However, that risk existed and was even greater when Plaintiffs settled with the Settled Defendants a year ago, when class certification had been denied.

The Court begins by comparing the instant settlement with Remaining Defendants to the settlements with the Settled Defendants, in light of the facts that existed at the time each settlement was reached. The Court then discusses the relative strengths and weaknesses of Plaintiffs' case to assess the reasonableness of the instant settlement.

A. Comparison to the Initial Settlements

1. Comparing the Settlement Amounts

The Court finds that the settlements with the Settled Defendants provide a useful benchmark against which to analyze the reasonableness of the instant settlement. The settlements with the Settled Defendants led to a fund totaling $20 million. *See* ECF No. 915 at 3. In approving the settlements, the Court relied upon the fact that the Settled Defendants employed 8% of Class members and paid out 5% of the total Class compensation during the Class period. *See* ECF No. 539 at 16:20-22 (Plaintiffs' counsel's explanation at the preliminary approval hearing with the Settled Defendants that the 5% figure "giv[es] you a sense of how big a slice of the case this settlement is relative to the rest of the case"). If Remaining Defendants were to settle at the same (or higher) rate as the Settled Defendants, Remaining Defendants' settlement fund would need to total at least $380 million. This number results from the fact that Remaining Defendants paid out 95% of the Class compensation during the Class period, while Settled Defendants paid only 5% of the Class compensation during the Class period.[8]

At the hearing on the instant Motion, counsel for Remaining Defendants suggested that the

[8] One way to think about this is to set up the simple equation: 5/95 = $20,000,000/x. This equation asks the question of how much 95% would be if 5% were $20,000,000. Solving for x would result in $380,000,000.

relevant benchmark is not total Class compensation, but rather is total Class membership. This would result in a benchmark figure for the Remaining Defendants of $230 million (92 divided by 8 is 11.5; 11.5 times $20 million is $230 million).[9] At a minimum, counsel suggested, the Court should compare the settlement amount to a range of $230 million to $380 million, within which the instant settlement falls. The Court rejects counsel's suggestion, which is contrary to the record. Counsel has provided no basis for why the number of Class members employed by each Defendant is a relevant metric. To the contrary, the relevant inquiry has always been total Class compensation. For example, in both of the settlements with the Settled Defendants and in the instant settlement, the Plans of Allocation call for determining each individual Class member's pay out by dividing the Class member's compensation during the Class period by *the total Class compensation during the Class period*. ECF No. 809 at 6 (noting that the denominator in the plan of allocation in the settlements with the Settled Defendants is the "total of base salaries paid to all approved Claimants in class positions during the Class period"); ECF No. 920 at 22 (same in the instant settlement); *see also* ECF No. 539 at 16:20-22 (Plaintiffs' counsel's statement that percent of the total Class compensation was relevant for benchmarking the settlements with the Settled Defendants to the rest of the case). At no point in the record has the percentage of Class membership employed by each Defendant ever been the relevant factor for determining damages exposure. Accordingly, the Court rejects the metric proposed by counsel for Remaining Defendants. Using the Settled Defendants' settlements as a yardstick, the appropriate benchmark settlement for the Remaining Defendants would be at least $380 million, more than $50 million greater than what the instant settlement provides.

Counsel for Remaining Defendants also suggested that benchmarking against the initial settlements would be inappropriate because the magnitude of the settlement numbers for Remaining Defendants dwarfs the numbers at issue in the Settled Defendants' settlements. This argument is premised on the idea that Defendants who caused more damage to the Class and who benefited more by suppressing a greater portion of class compensation should have to pay less than

[9] Again, 8/92 = $20,000,000/x would lead to x = $230,000,000.

Defendants who caused less damage and who benefited less from the allegedly wrongful conduct. This argument is unpersuasive. Remaining Defendants are alleged to have received 95% of the benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the Class in terms of lost compensation. Therefore, Remaining Defendants should have to pay at least 95% of the damages, which, under the instant settlement, they would not.

The Court also notes that had Plaintiffs prevailed at trial on their more than $3 billion damages claim, antitrust law provides for automatic trebling, *see* 15 U.S.C. § 15(a), so the total damages award could potentially have exceeded $9 billion. While the Ninth Circuit has not determined whether settlement amounts in antitrust cases must be compared to the single damages award requested by Plaintiffs or the automatically trebled damages amount, *see Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009), the instant settlement would lead to a total recovery of 11.29% of the single damages proposed by Plaintiffs' expert or 3.76% of the treble damages. Specifically, Dr. Leamer has calculated the total damages to the Class resulting from Defendants' allegedly unlawful conduct as $3.05 billion. *See* ECF No. 856-10. If the Court approves the instant settlements, the total settlements with all Defendants would be $344.5 million. This total would amount to 11.29% of the single damages that Dr. Leamer opines the Class suffered or 3.76% if Dr. Leamer's damages figure had been trebled.

2. Relative Procedural Posture

The discount that Remaining Defendants have received vis-à-vis the Settled Defendants is particularly troubling in light of the changes in the procedural posture of the case between the two settlements, changes that the Court would expect to have increased, rather than decreased, Plaintiffs' bargaining power. Specifically, at the time the Settled Defendants settled, Plaintiffs were at a particularly weak point in their case. Though Plaintiffs had survived Defendants' motion to dismiss, Plaintiffs' motion for class certification had been denied, albeit without prejudice. Plaintiffs had re-briefed the class certification motion, but had no class certification ruling in their favor at the time they settled with the Settled Defendants. If the Court ultimately granted certification, Plaintiffs also did not know whether the Ninth Circuit would grant Federal Rule of

Civil Procedure 23(f) review and reverse the certification. Accordingly, at that point, Defendants had significant leverage.

In contrast, the procedural posture of the case swung dramatically in Plaintiffs' favor after the initial settlements were reached. Specifically, the Court certified the Class over the vigorous objections of Defendants. In the 86-page order granting class certification, the Court repeatedly referred to Plaintiffs' evidence as "substantial" and "extensive," and the Court stated that it "could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case." ECF No. 531 at 69. Thereafter, the Ninth Circuit denied Defendants' request to review the class certification order under Federal Rule of Civil Procedure 23(f). This Court also denied Defendants' five motions for summary judgment and denied Defendants' motion to exclude Plaintiffs' principal expert on antitrust impact and damages. The instant settlement was reached a mere two weeks before the final pretrial conference and one month before a trial at which damaging evidence regarding Defendants would have been presented.

In sum, Plaintiffs were in a much stronger position at the time of the instant settlement—after the Class had been certified, appellate review of class certification had been denied, and Defendants' dispositive motions and motion to exclude Dr. Leamer's testimony had been denied—than they were at the time of the settlements with the Settled Defendants, when class certification had been denied. This shift in the procedural posture, which the Court would expect to have increased Plaintiffs' bargaining power, makes the more recent settlements for a proportionally lower amount even more troubling.

B. Strength of Plaintiffs' Case

The Court now turns to the strength of Plaintiffs' case against the Remaining Defendants to evaluate the reasonableness of the settlement.

At the hearing on the instant Motion, Plaintiffs' counsel contended that one of the reasons the instant settlement was proportionally lower than the previous settlements is that the documentary evidence against the Settled Defendants (particularly, Lucasfilm and Pixar) is more compelling than the documentary evidence against the Remaining Defendants. As an initial matter,

the Court notes that relevant evidence regarding the Settled Defendants would be admissible at a trial against Remaining Defendants because Plaintiffs allege an overarching conspiracy that included all Defendants. Accordingly, evidence regarding the role of Lucasfilm and Pixar in the creation of and the intended effect of the overarching conspiracy would be admissible.

Nonetheless, the Court notes that Plaintiffs are correct that there are particularly clear statements from Lucasfilm and Pixar executives regarding the nature and goals of the alleged conspiracy. Specifically, Edward Catmull (Pixar President) conceded in his deposition that anti-solicitation agreements were in place because solicitation "messes up the pay structure." ECF No. 431-9 at 81. Similarly, George Lucas (former Lucasfilm Chairman of the Board and CEO) stated, "we cannot get into a bidding war with other companies because we don't have the margins for that sort of thing." ECF No. 749-23 at 9.

However, there is equally compelling evidence that comes from the documents of the Remaining Defendants. This is particularly true for Google and Apple, the executives of which extensively discussed and enforced the anti-solicitation agreements. Specifically, as discussed in extensive detail in this Court's previous orders, Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar), Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO), and Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) were key players in creating and enforcing the anti-solicitation agreements. The Court now turns to the evidence against the Remaining Defendants that the finder of fact is likely to find compelling.

1. Evidence Related to Apple

There is substantial and compelling evidence that Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar) was a, if not the, central figure in the alleged conspiracy. Several witnesses, in their depositions, testified to Mr. Jobs' role in the anti-solicitation agreements. For example, Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) stated that Mr. Jobs "believed that you should not be hiring each others', you know, technical people" and that "it was inappropriate in [Mr. Jobs'] view for us

to be calling in and hiring people." ECF No. 819-12 at 77. Edward Catmull (Pixar President) stated that Mr. Jobs "was very adamant about protecting his employee force." ECF No. 431-9 at 97. Sergey Brin (Google Co-Founder) testified that "I think Mr. Jobs' view was that people shouldn't piss him off. And I think that things that pissed him off were—would be hiring, you know—whatever." ECF No. 639-1 at 112. There would thus be ample evidence Mr. Jobs was involved in expanding the original anti-solicitation agreement between Lucasfilm and Pixar to the other Defendants in this case. After the agreements were extended, Mr. Jobs played a central role in enforcing these agreements. Four particular sets of evidence are likely to be compelling to the fact-finder.

First, after hearing that Google was trying to recruit employees from Apple's Safari team, Mr. Jobs threatened Mr. Brin, stating, as Mr. Brin recounted, "if you hire a single one of these people that means war." ECF No. 833-15.[10] In an email to Google's Executive Management Team as well as Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), Mr. Brin advised: "lets [sic] not make any new offers or contact new people at Apple until we have had a chance to discuss." *Id.* Mr. Campbell then wrote to Mr. Jobs: "Eric [Schmidt] told me that he got directly involved and firmly stopped all efforts to recruit anyone from Apple." ECF No. 746-5. As Mr. Brin testified in his deposition, "Eric made a—you know, a—you know, at least some kind of—had a conversation with Bill to relate to Steve to calm him down." ECF No. 639-1 at 61. As Mr. Schmidt put it, "Steve was unhappy, and Steve's unhappiness absolutely influenced the change we made in recruiting practice." ECF No. 819-12 at 21. Danielle Lambert (Apple's head of Human Resources) reciprocated to maintain Apple's end of the anti-solicitation agreements, instructing Apple recruiters: "Please add Google to your 'hands-off' list. We recently agreed not to recruit from one another so if you hear of any recruiting they are doing against us, please be sure to let me know." ECF No. 746-15.

[10] On the same day, Mr. Campbell sent an email to Mr. Brin and to Larry Page (Google Co-Founder) stating, "Steve just called me again and is pissed that we are still recruiting his browser guy." ECF No. 428-13. Mr. Page responded "[h]e called a few minutes ago and demanded to talk to me." *Id.*

Second, other Defendants' CEOs maintained the anti-solicitation agreements out of fear of and deference to Mr. Jobs. For example, in 2005, when considering whether to enter into an anti-solicitation agreement with Apple, Bruce Chizen (former Adobe CEO), expressed concerns about the loss of "top talent" if Adobe did not enter into an anti-solicitation agreement with Apple, stating, "if I tell Steve it's open season (other than senior managers), he will deliberately poach Adobe just to prove a point. Knowing Steve, he will go after some of our top Mac talent like Chris Cox and he will do it in a way in which they will be enticed to come (extraordinary packages and Steve wooing)."[11] ECF No. 297-15.

This was the genesis of the Apple-Adobe agreement. Specifically, after Mr. Jobs complained to Mr. Chizen on May 26, 2005 that Adobe was recruiting Apple employees, ECF No. 291-17, Mr. Chizen responded by saying, "I thought we agreed not to recruit any senior level employees . . . . I would propose we keep it that way. Open to discuss. It would be good to agree." *Id*. Mr. Jobs was not satisfied, and replied by threatening to send Apple recruiters after Adobe's employees: "OK, I'll tell our recruiters that they are free to approach any Adobe employee who is not a Sr. Director or VP. Am I understanding your position correctly?" *Id*. Mr. Chizen immediately gave in: "I'd rather agree NOT to actively solicit any employee from either company . . . . If you are in agreement I will let my folks know." *Id*. (emphasis in original). The next day, Theresa Townsley (Adobe Vice President Human Resources) announced to her recruiting team, "Bruce and Steve Jobs have an agreement that we are not to solicit ANY Apple employees, and vice versa." ECF No. 291-18 (emphasis in original). Adobe then placed Apple on its "[c]ompanies that are off limits" list, which instructed Adobe employees not to cold call Apple employees. ECF No. 291-11.

Google took even more drastic actions in response to Mr. Jobs. For example, when a recruiter from Google's engineering team contacted an Apple employee in 2007, Mr. Jobs forwarded the message to Mr. Schmidt and stated, "I would be very pleased if your recruiting department would stop doing this." ECF No. 291-23. Google responded by making a "public example" out of the recruiter and "terminat[ing] [the recruiter] within the hour." *Id*. The aim of this

[11] Mr. Jobs successfully expanded the anti-solicitation agreements to Macromedia, a company acquired by Adobe, both before and after Adobe's acquisition of Macromedia.

public spectacle was to "(hopefully) prevent future occurrences." *Id.* Once the recruiter was terminated, Mr. Schmidt emailed Mr. Jobs, apologizing and informing Mr. Jobs that the recruiter had been terminated. Mr. Jobs forwarded Mr. Schmidt's email to an Apple human resources official and stated merely, ":)." ECF No. 746-9.

A year prior to this termination, Google similarly took seriously Mr. Jobs' concerns. Specifically, in 2006, Mr. Jobs emailed Mr. Schmidt and said, "I am told that Googles [sic] new cell phone software group is relentlessly recruiting in our iPod group. If this is indeed true, can you put a stop to it?" ECF No. 291-24 at 3. After Mr. Schmidt forwarded this to Human Resources professionals at Google, Arnnon Geshuri (Google Recruiting Director) prepared a detailed report stating that an extensive investigation did not find a breach of the anti-solicitation agreement.

Similarly, in 2006, Google scrapped plans to open a Google engineering center in Paris after a Google executive emailed Mr. Jobs to ask whether Google could hire three *former* Apple engineers to work at the prospective facility, and Mr. Jobs responded "[w]e'd strongly prefer that you not hire these guys." ECF No. 814-2. The whole interaction began with Google's request to Steve Jobs for permission to hire Jean-Marie Hullot, an Apple engineer. The record is not clear whether Mr. Hullot was a current or former Apple employee. A Google executive contacted Steve Jobs to ask whether Google could make an offer to Mr. Hullot, and Mr. Jobs did not timely respond to the Google executive's request. At this point, the Google executive turned to Intuit's Board Chairman Bill Campbell as a potential ambassador from Google to Mr. Jobs. Specifically, the Google executive noted that Mr. Campbell "is on the board at Apple and Google, so Steve will probably return his call." ECF No. 428-6. The same day that Mr. Campbell reached out to Mr. Jobs, Mr. Jobs responded to the Google executive, seeking more information on what exactly the Apple engineer would be working. ECF No. 428-9. Once Mr. Jobs was satisfied, he stated that the hire "would be fine with me." *Id.* However, two weeks later, when Mr. Hullot and a Google executive sought Mr. Jobs' permission to hire four of Mr. Hullot's former Apple colleagues (three were former Apple employees and one had given notice of impending departure from Apple), Mr. Jobs promptly responded, indicating that the hires would not be acceptable. ECF No. 428-9.

Google promptly scrapped the plan, and the Google executive responded deferentially to Mr. Jobs, stating, "Steve, Based on your strong preference that we not hire the ex-Apple engineers, Jean-Marie and I decided not to open a Google Paris engineering center." *Id.* The Google executive also forwarded the email thread to Mr. Brin, Larry Page (Google Co-Founder), and Mr. Campbell. *Id.*

Third, Mr. Jobs attempted (unsuccessfully) to expand the anti-solicitation agreements to Palm, even threatening litigation. Specifically, Mr. Jobs called Edward Colligan (former President and CEO of Palm) to ask Mr. Colligan to enter into an anti-solicitation agreement and threatened patent litigation against Palm if Palm refused to do so. ECF No. 293 ¶¶ 6-8. Mr. Colligan responded via email, and told Mr. Jobs that Mr. Jobs' "proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal." *Id.* at 4-5. Mr. Colligan went on to say that, "We can't dictate where someone will work, nor should we try. I can't deny people who elect to pursue their livelihood at Palm the right to do so simply because they now work for Apple, and I wouldn't want you to do that to current Palm employees." *Id.* at 5. Finally, Mr. Colligan wrote that "[t]hreatening Palm with a patent lawsuit in response to a decision by one employee to leave Apple is just out of line. A lawsuit would not serve either of our interests, and will not stop employees from migrating between our companies . . . . We will both just end up paying a lot of lawyers a lot of money." *Id.* at 5-6. Mr. Jobs wrote the following back to Mr. Colligan: "This is not satisfactory to Apple." *Id.* at 8. Mr. Jobs went on to write that "I'm sure you realize the asymmetry in the financial resources of our respective companies when you say: 'we will both just end up paying a lot of lawyers a lot of money.'" *Id.* Mr. Jobs concluded: "My advice is to take a look at our patent portfolio before you make a final decision here." *Id.*

Fourth, Apple's documents provide strong support for Plaintiffs' theory of impact, namely that rigid wage structures and internal equity concerns would have led Defendants to engage in structural changes to compensation structures to mitigate the competitive threat that solicitation would have posed. Apple's compensation data shows that, for each year in the Class period, Apple had a "job structure system," which included categorizing and compensating its workforce

according to a discrete set of company-wide job levels assigned to all salaried employees and four associated sets of base salary ranges applicable to "Top," "Major," "National," and "Small" geographic markets. ECF No. 745-7 at 14-15, 52-53; ECF No.517-16 ¶¶ 6, 10 & Ex. B. Every salary range had a "min," "mid," and "max" figure. *See id*. Apple also created a Human Resources and recruiting tool called "Merlin," which was an internal system for tracking employee records and performance, and required managers to grade employees at one of four pre-set levels. *See* ECF No. 749-6 at 142-43, 145-46; ECF No. 749-11 at 52-53; ECF No. 749-12 at 33. As explained by Tony Fadell (former Apple Senior Vice President, iPod Division, and advisor to Steve Jobs), Merlin "would say, this is the employee, this is the level, here are the salary ranges, and through that tool we were then—we understood what the boundaries were." ECF No. 749-11 at 53. Going outside these prescribed "guidelines" also required extra approval. ECF No. 749-7 at 217; ECF No. 749-11 at 53 ("And if we were to go outside of that, then we would have to pull in a bunch of people to then approve anything outside of that range.").

Concerns about internal equity also permeated Apple's compensation program. Steven Burmeister (Apple Senior Director of Compensation) testified that internal equity—which Mr. Burmeister defined as the notion of whether an employee's compensation is "fair based on the individual's contribution relative to the other employees in your group, or across your organization"—inheres in some, "if not all," of the guidelines that managers consider in determining starting salaries. ECF No. 745-7 at 61-64; ECF No. 753-12. In fact, as explained by Patrick Burke (former Apple Technical Recruiter and Staffing Manager), when hiring a new employee at Apple, "compar[ing] the candidate" to the other people on the team they would join "was the biggest determining factor on what salary we gave." ECF No. 745-6 at 279.

2. Evidence Related to Google

The evidence against Google is equally compelling. Email evidence reveals that Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) terminated at least two recruiters for violations of anti-solicitation agreements, and threatened to terminate more. As discussed above, there is direct evidence that Mr. Schmidt terminated a

recruiter at Steve Jobs' behest after the recruiter attempted to solicit an Apple employee. Moreover, in an email to Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), Mr. Schmidt indicated that he directed a for-cause termination of another Google recruiter, who had attempted to recruit an executive of eBay, which was on Google's do-not-cold-call list. ECF No. 814-14. Finally, as discussed in more detail below, Mr. Schmidt informed Paul Otellini (CEO of Intel and Member of the Google Board of Directors) that Mr. Schmidt would terminate any recruiter who recruited Intel employees.

Furthermore, Google maintained a formal "Do Not Call" list, which grouped together Apple, Intel, and Intuit and was approved by top executives. ECF No. 291-28. The list also included other companies, such as Genentech, Paypal, and eBay. *Id.* A draft of the "Do Not Call" list was presented to Google's Executive Management Group, a committee consisting of Google's senior executives, including Mr. Schmidt, Larry Page (Google Co-Founder), Sergey Brin (Google Co-Founder), and Shona Brown (former Google Senior Vice President of Business Operations). ECF No. 291-26. Mr. Schmidt approved the list. *See id.*; *see also* ECF No. 291-27 (email from Mr. Schmidt stating: "This looks very good."). Moreover, there is evidence that Google executives knew that the anti-solicitation agreements could lead to legal troubles, but nevertheless proceeded with the agreements. When Ms. Brown asked Mr. Schmidt whether he had any concerns with sharing information regarding the "Do Not Call" list with Google's competitors, Mr. Schmidt responded that he preferred that it be shared "verbally[,] since I don't want to create a paper trail over which we can be sued later?" ECF No. 291-40. Ms. Brown responded: "makes sense to do orally. i agree." *Id.*

Google's response to competition from Facebook also demonstrates the impact of the alleged conspiracy. Google had long been concerned about Facebook hiring's effect on retention. For example, in an email to top Google executives, Mr. Brin in 2007 stated that "the facebook phenomenon creates a real retention problem." ECF No. 814-4. A month later, Mr. Brin announced a policy of making counteroffers within one hour to any Google employee who received an offer from Facebook. ECF No. 963-2.

In March 2008, Arnnon Geshuri (Google Recruiting Director) discovered that non-party Facebook had been cold calling into Google's Site Reliability Engineering ("SRE") team. Mr. Geshuri's first response was to suggest contacting Sheryl Sandberg (Chief Operating Officer for non-party Facebook) in an effort to "ask her to put a stop to the targeted sourcing effort directed at our SRE team" and "to consider establishing a mutual 'Do Not Call' agreement that specifies that we will not cold-call into each other." ECF No. 963-3. Mr. Geshuri also suggested "look[ing] internally and review[ing] the attrition rate for the SRE group," stating, "[w]e may want to consider additional individual retention incentives or *team incentives* to keep attrition as low as possible in SRE." *Id*. (emphasis added). Finally, an alternative suggestion was to "[s]tart an aggressive campaign to call into their company and go after their folks—no holds barred. We would be unrelenting and a force of nature." *Id*. In response, Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), in his capacity as an advisor to Google, suggested "Who should contact Sheryl [Sandberg] (or Mark [Zuckerberg]) to get a cease fire? We have to get a truce." *Id.* Facebook refused.

In 2010, Google altered its salary structure with a "Big Bang" in response to Facebook's hiring, which provides additional support for Plaintiffs' theory of antitrust impact. Specifically, after a period in which Google lost a significant number of employees to Facebook, Google began to study Facebook's solicitation of Google employees. ECF No. 190 ¶ 109. One month after beginning this study, Google announced its "Big Bang," which involved an increase to the base salary of *all* of its salaried employees by 10% and provided an immediate cash bonus of $1,000 to all employees. ECF No. 296-18. Laszlo Bock (Google Senior Vice President of People Operations) explained that the rationale for the Big Bang included: (1) being "responsive to rising attrition;" (2) supporting higher retention because "higher salaries generate higher fixed costs;" and (3) being "very strategic because start-ups don't have the cash flow to match, and big companies are (a) too worried about internal equity and scalability to do this and (b) don't have the margins to do this." ECF No. 296-20.

Other Google documents provide further evidence of Plaintiffs' theory of antitrust impact. For example, Google's Chief Culture Officer stated that "[c]old calling into companies to recruit is to be expected unless they're on our 'don't call' list." ECF No. 291-41. Moreover, Google found that although referrals were the largest source of hires, "agencies and passively sourced candidates offer[ed] the highest yield." ECF No. 780-8. The spread of information between employees had there been active solicitations—which is central to Plaintiffs' theory of impact—is also demonstrated in Google's evidence. For example, one Google employee states that "[i]t's impossible to keep something like this a secret. The people getting counter offers talk, not just to Googlers and ex-Googlers, but also to the competitors where they received their offers (in the hopes of improving them), and those competitors talk too, using it as a tool to recruit more Googlers." ECF No. 296-23.

The wage structure and internal equity concerns at Google also support Plaintiffs' theory of impact. Google had many job families, many grades within job families, and many job titles within grades. *See, e.g.*, ECF No. 298-7, ECF No. 298-8; *see also* Cisneros Decl., Ex. S (Brown Depo.) at 74-76 (discussing salary ranges utilized by Google); ECF No. 780-4 at 25-26 (testifying that Google's 2007 salary ranges had generally the same structure as the 2004 salary ranges). Throughout the Class period, Google utilized salary ranges and pay bands with minima and maxima and either means or medians. ECF No. 958-1 ¶ 66; *see* ECF No. 427-3 at 15-17. As explained by Shona Brown (former Google Senior Vice President, Business Operations), "if you discussed a specific role [at Google], you could understand that role was at a specific level on a certain job ladder." ECF No. 427-3 at 27-28; ECF No. 745-11. Frank Wagner (Google Director of Compensation) testified that he could locate the target salary range for jobs at Google through an internal company website. *See* ECF No. 780-4 at 31-32 ("Q: And if you wanted to identify what the target salary would be for a certain job within a certain grade, could you go online or go to some place . . . and pull up what that was for that job family and that grade? . . . A: Yes."). Moreover, Google considered internal equity to be an important goal. Google utilized a salary algorithm in part for the purpose of "[e]nsur[ing] internal equity by managing salaries within a

reasonable range." ECF No. 814-19. Furthermore, because Google "strive[d] to achieve fairness in overall salary distribution," "high performers with low salaries [would] get larger percentage increases than high performers with high salaries." ECF No. 817-1 at 15.

In addition, Google analyzed and compared its equity compensation to Apple, Intel, Adobe, and Intuit, among other companies, each of which it designated as a "peer company" based on meeting criteria such as being a "high-tech company," a "high-growth company," and a "key labor market competitor." ECF No. 773-1. In 2007, based in part on an analysis of Google as compared to its peer companies, Mr. Bock and Dave Rolefson (Google Equity Compensation Manager) wrote that "[o]ur biggest labor market competitors are significantly exceeding their own guidelines to beat Google for talent." *Id*.

Finally, Google's own documents undermine Defendants' principal theory of lack of antitrust impact, that compensation decisions would be one off and not classwide. Alan Eustace (Google Senior Vice President) commented on concerns regarding competition for workers and Google's approach to counteroffers by noting that, "it sometimes makes sense to make changes in compensation, even if it introduces discontinuities in your current comp, to save your best people, and send a message to the hiring company that we'll fight for our best people." ECF No. 296-23. Because recruiting "a few really good people" could inspire "many, many others [to] follow," Mr. Eustace concluded, "[y]ou can't afford to be a rich target for other companies." *Id.* According to him, the "long-term . . . right approach is not to deal with these situations as one-off's but to have a *systematic approach* to compensation that makes it very difficult for anyone to get a better offer." *Id*. (emphasis added).

Google's impact on the labor market before the anti-solicitation agreements was best summarized by Meg Whitman (former CEO of eBay) who called Mr. Schmidt "to talk about [Google's] hiring practices." ECF No. 814-15. As Eric Schmidt told Google's senior executives, Ms. Whitman said "Google is the talk of the valley because [you] are driving up salaries across the board." *Id.* A year after this conversation, Google added eBay to its do-not-cold-call list. ECF No. 291-28.

3. Evidence Related to Intel

There is also compelling evidence against Intel. Google reacted to requests regarding enforcement of the anti-solicitation agreement made by Intel executives similarly to Google's reaction to Steve Jobs' request to enforce the agreements discussed above. For example, after Paul Otellini (CEO of Intel and Member of the Google Board of Directors) received an internal complaint regarding Google's successful recruiting efforts of Intel's technical employees on September 26, 2007, ECF No. 188-8 ("Paul, I am losing so many people to Google . . . . We are countering but thought you should know."), Mr. Otellini forwarded the email to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) and stated "Eric, can you pls help here???" *Id.* Mr. Schmidt obliged and forwarded the email to his recruiting team, who prepared a report for Mr. Schmidt on Google's activities. ECF No. 291-34. The next day, Mr. Schmidt replied to Mr. Otellini, "If we find that a recruiter called into Intel, we will terminate the recruiter," the same remedy afforded to violations of the Apple-Google agreement. ECF No. 531 at 37. In another email to Mr. Schmidt, Mr. Otellini stated, "Sorry to bother you again on this topic, but my guys are very troubled by Google continuing to recruit our key players." *See* ECF No. 428-8.

Moreover, Mr. Otellini was aware that the anti-solicitation agreement could be legally troublesome. Specifically, Mr. Otellini stated in an email to another Intel executive regarding the Google-Intel agreement: "Let me clarify. We have nothing signed. We have a handshake 'no recruit' between eric and myself. I would not like this broadly known." *Id.*

Furthermore, there is evidence that Mr. Otellini knew of the anti-solicitation agreements to which Intel was not a party. Specifically, both Sergey Brin (Google Co-Founder) and Mr. Schmidt of Google testified that they would have told Mr. Otellini that Google had an anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure that we would have mentioned it[.]"); ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr. Otellini's membership on Google's board. ECF No. 771 at 4. The fact that Intel was added to

Google's do-not-cold-call list on the same day that Apple was added further suggests Intel's participation in an overarching conspiracy. ECF No. 291-28.

Additionally, notwithstanding the fact that Intel and Google were competitors for talent, Mr. Otellini "lifted from Google" a Google document discussing the bonus plans of peer companies including Apple and Intel. Cisneros Decl., Ex. 463. True competitors for talent would not likely share such sensitive bonus information absent agreements not to compete.

Moreover, key documents related to antitrust impact also implicate Intel. Specifically, Intel recognized the importance of cold calling and stated in its "Complete Guide to Sourcing" that "[Cold] [c]alling candidates is one of the most efficient and effective ways to recruit." ECF No. 296-22. Intel also benchmarked compensation against other "tech companies generally considered comparable to Intel," which Intel defined as a "[b]lend of semiconductor, software, networking, communications, and diversified computer companies." ECF No. 754-2. According to Intel, in 2007, these comparable companies included Apple and Google. *Id.* These documents suggest, as Plaintiffs contend, that the anti-solicitation agreements led to structural, rather than individual depression, of Class members' wages.

Furthermore, Intel had a "compensation structure," with job grades and job classifications. *See* ECF No. 745-13 at 73 ("[W]e break jobs into one of three categories—job families, we call them—R&D, tech, and nontech, there's a lot more . . . ."). The company assigned employees to a grade level based on their skills and experience. ECF No. 745-11 at 23; *see also* ECF No. 749-17 at 45 (explaining that everyone at Intel is assigned a "classification" similar to a job grade). Intel standardized its salary ranges throughout the company; each range applied to multiple jobs, and most jobs spanned multiple salary grades. ECF No. 745-16 at 59. Intel further broke down its salary ranges into quartiles, and compensation at Intel followed "a bell-curve distribution, where most of the employees are in the middle quartiles, and a much smaller percentage are in the bottom and top quartiles." *Id.* at 62-63.

Intel also used a software tool to provide guidance to managers about an employee's pay range which would also take into account market reference ranges and merit. ECF No. 758-9. As

explained by Randall Goodwin (Intel Technology Development Manager), "[i]f the tool recommended something and we thought we wanted to make a proposed change that was outside its guidelines, we would write some justification." ECF No. 749-15 at 52. Similarly, Intel regularly ran reports showing the salary range distribution of its employees. ECF No. 749-16 at 64.

The evidence also supports the rigidity of Intel's wage structure. For example, in a 2004 Human Resources presentation, Intel states that, although "[c]ompensation differentiation is desired by Intel's Meritocracy philosophy," "short and long term high performer differentiation is questionable." ECF No. 758-10 at 13. Indeed, Intel notes that "[l]ack of differentiation has existed historically based on an analysis of '99 data." *Id*. at 19. As key "[v]ulnerability [c]hallenges," Intel identifies: (1) "[m]anagers *(in)ability* to distinguish at [f]ocal"—"actual merit increases are significantly reduced from system generated increases," "[l]ong term threat to retention of key players"; (2) "*[l]ittle to no actual pay differentiation for HPs* [high performers]"; and (3) "[n]o explicit strategy to differentiate." *Id*. at 24 (emphasis added).

In addition, Intel used internal equity "to determine wage rates for new hires and current employees that correspond to each job's relative value to Intel." ECF No. 749-16 at 210-11; ECF No. 961-5. To assist in that process, Intel used a tool that generates an "Internal Equity Report" when making offers to new employees. ECF No. 749-16 at 212-13. In the words of Ogden Reid (Intel Director of Compensation and Benefits), "[m]uch of our culture screams egalitarianism . . . . While we play lip service to meritocracy, we really believe more in treating everyone the same within broad bands." ECF No. 769-8.

An Intel human resources document from 2002—prior to the anti-solicitation agreements—recognized "continuing inequities in the alignment of base salaries/EB targets between hired and acquired Intel employees" and "parallel issues relating to accurate job grading within these two populations." ECF No. 750-15. In response, Intel planned to: (1) "Review exempt job grade assignments for job families with 'critical skills.' Make adjustments, as appropriate"; and (2) "Validate perception of inequities . . . . Scope impact to employees. Recommend adjustments, as

appropriate." *Id.* An Intel human resources document confirms that, in or around 2004, "[n]ew hire salary premiums *drove* salary range adjustment." ECF No. 298-5 at 7 (emphasis added).

Intel would "match an Intel job code in grade to a market survey job code in grade," ECF No. 749-16 at 89, and use that as part of the process for determining its "own focal process or pay delivery," *id.* at 23. If job codes fell below the midpoint, plus or minus a certain percent, the company made "special market adjustment[s]." *Id.* at 90.

4. Evidence Related to Adobe

Evidence from Adobe also suggests that Adobe was aware of the impact of its anti-solicitation agreements. Adobe personnel recognized that "Apple would be a great target to look into" for the purpose of recruiting, but knew that they could not do so because, "[u]nfortunately, Bruce [Chizen (former Adobe CEO)] and Apple CEO Steve Jobs have a gentleman's agreement not to poach each other's talent." ECF No. 291-13. Adobe executives were also part and parcel of the group of high-ranking executives that entered into, enforced, and attempted to expand the anti-solicitation agreements. Specifically, Mr. Chizen, in response to discovering that Apple was recruiting employees of Macromedia (a separate entity that Adobe would later acquire), helped ensure, through an email to Mr. Jobs, that Apple would honor Apple's pre-existing anti-solicitation agreements with both Adobe and Macromedia after Adobe's acquisition of Macromedia. ECF No. 608-3 at 50.

Adobe viewed Google and Apple to be among its top competitors for talent and expressed concern about whether Adobe was "winning the talent war." ECF No. 296-3. Adobe further considered itself in a "six-horse race from a benefits standpoint," which included Google, Apple, and Intuit as among the other "horses." *See* ECF No. 296-4. In 2008, Adobe benchmarked its compensation against nine companies including Google, Apple, and Intel. ECF No. 296-4; *cf.* ECF No. 652-6 (showing that, in 2010, Adobe considered Intuit to be a "direct peer," and considered Apple, Google, and Intel to be "reference peers," though Adobe did not actually benchmark compensation against these latter companies).

Nevertheless, despite viewing other Defendants as competitors, evidence from Adobe suggests that Adobe had knowledge of the bilateral agreements to which Adobe was not a party. Specifically, Adobe shared confidential compensation information with other Defendants, despite the fact that Adobe viewed at least some of the other Defendants as competitors and did not have a bilateral agreement with them. For example, HR personnel at Intuit and at Adobe exchanged information labeled "confidential" regarding how much compensation each firm would give and to which employees that year. ECF No. 652-8. Adobe and Intuit shared confidential compensation information even though the two companies had no bilateral anti-solicitation agreement, and Adobe viewed Intuit as a direct competitor for talent. Such direct competitors for talent would not likely share such sensitive compensation information in the absence of an overarching conspiracy.

Meanwhile, Google circulated an email that expressly discussed how its "budget is comparable to other tech companies" and compared the precise percentage of Google's merit budget increases to that of Adobe, Apple, and Intel. ECF No. 807-13. Google had Adobe's precise percentage of merit budget increases even though Google and Adobe had no bilateral anti-solicitation agreement. Such sharing of sensitive compensation information among competitors is further evidence of an overarching conspiracy.

Adobe recognized that in the absence of the anti-solicitation agreements, pay increases would be necessary, echoing Plaintiffs' theory of impact. For example, out of concern that one employee—a "star performer" due to his technical skills, intelligence, and collaborative abilities—might leave Adobe because "he could easily get a great job elsewhere if he desired," Adobe considered how best to retain him. ECF No. 799-22. In so doing, Adobe expressed concern about the fact that this employee had already interviewed with four other companies and communicated with friends who worked there. *Id.* Thus, Adobe noted that the employee "was aware of his value in the market" as well as the fact that the employee's friends from college were "making approximately $15k more per year than he [wa]s." *Id.* In response, Adobe decided to give the employee an immediate pay raise. *Id.*

Plaintiffs' theory of impact is also supported by evidence that every job position at Adobe was assigned a job title, and every job title had a corresponding salary range within Adobe's salary structure, which included a salary minimum, middle, and maximum. *See* ECF No. 804-17 at 4, 8, 72, 85-86. Adobe expected that the distribution of its existing employees' salaries would fit "a bell curve." ECF No. 749-5 at 57. To assist managers in staying within the prescribed ranges for setting and adjusting salaries, Adobe had an online salary planning tool as well as salary matrices, which provided managers with guidelines based on market salary data. *See* ECF No. 804-17 at 29-30 ("[E]ssentially the salary planning tool is populated with employee information for a particular manager, so the employees on their team [sic]. You have the ability to kind of look at their current compensation. It shows them what the range is for the current role that they're in . . . . The tool also has the ability to provide kind of the guidelines that we recommend in terms of how managers might want to think about spending their allocated budget."). Adobe's practice, if employees were below the minimum recommended salary range, was to "adjust them to the minimum as part of the annual review" and "red flag them." *Id*. at 12. Deviations from the salary ranges would also result in conversations with managers, wherein Adobe's officers explained, "we have a minimum for a reason because we believe you need to be in this range to be competitive." *Id.*

Internal equity was important at Adobe, as it was at other Defendants. As explained by Debbie Streeter (Adobe Vice President, Total Rewards), Adobe "always look[ed] at internal equity as a data point, because if you are going to go hire somebody externally that's making . . . more than somebody who's an existing employee that's a high performer, you need to know that before you bring them in." ECF No.749-5 at 175. Similarly, when considering whether to extend a counteroffer, Adobe advised "internal equity should ALWAYS be considered." ECF No. 746-7 at 5.

Moreover, Donna Morris (Adobe Senior Vice President, Global Human Resources Division) expressed concern "about internal equity due to compression (the market driving pay for new hires above the current employees)." ECF No. 298-9 ("Reality is new hires are requiring base pay at or above the midpoint due to an increasingly aggressive market."). Adobe personnel stated

that, because of the fixed budget, they may not be able to respond to the problem immediately "but could look at [compression] for FY2006 if market remains aggressive."[12] *Id.*

D. Weaknesses in Plaintiffs' Case

Plaintiffs contend that though this evidence is compelling, there are also weaknesses in Plaintiffs' case that make trial risky. Plaintiffs contend that these risks are substantial. Specifically, Plaintiffs point to the following challenges that they would have faced in presenting their case to a jury: (1) convincing a jury to find a single overarching conspiracy among the seven Defendants in light of the fact that several pairs of Defendants did not have anti-solicitation agreements with each other; (2) proving damages in light of the fact that Defendants intended to present six expert economists that would attack the methodology of Plaintiffs' experts; and (3) overcoming the fact that Class members' compensation has increased in the last ten years despite a sluggish economy and overcoming general anti-tech worker sentiment in light of the perceived and actual wealth of Class members. Plaintiffs also point to outstanding legal issues, such as the pending motions in limine and the pending motion to determine whether the per se or rule of reason analysis should apply, which could have aided Defendants' ability to present a case that the bilateral agreements had a pro-competitive purpose. *See* ECF No. 938 at 10-14.

The Court recognizes that Plaintiffs face substantial risks if they proceed to trial. Nonetheless, the Court cannot, in light of the evidence above, conclude that the instant settlement amount is within the range of reasonableness, particularly compared to the settlements with the Settled Defendants and the subsequent development of the litigation. The Court further notes that there is evidence in the record that mitigate at least some of the weaknesses in Plaintiffs' case.

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[12] Adobe also benchmarked compensation off external sources, which supports Plaintiffs' theory of Class-wide impact and undermines Defendants' theory that the anti-solicitation agreements had only one off, non-structural effects. For example, Adobe pegged its compensation structure as a "percentile" of average market compensation according to survey data from companies such as Radford. ECF No. 804-17 at 4. Mr. Chizen explained that the particular market targets that Adobe used as benchmarks for setting salary ranges "tended to be software, high-tech, those that were geographically similar to wherever the position existed." ECF No. 962-7 at 22. This demonstrated that the salary structures of the various Defendants were linked, such that the effect of one Defendant's salary structure would ripple across to the other Defendants through external sources like Radford.

As to proving an overarching conspiracy, several pieces of evidence undermine Defendants' contentions that the bilateral agreements were unrelated to each other. Importantly, two individuals, Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) and Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), personally entered into or facilitated each of the bilateral agreements in this case. Specifically, Mr. Jobs and George Lucas (former Chairman and CEO of Lucasfilm), created the initial anti-solicitation agreement between Lucasfilm and Pixar when Mr. Jobs was an executive at Pixar. Thereafter, Apple, under the leadership of Mr. Jobs, entered into an agreement with Pixar, which, as discussed below, Pixar executives compared to the Lucasfilm-Pixar agreement. It was Mr. Jobs again, who, as discussed above, reached out to Sergey Brin (Google Co-Founder) and Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) to create the Apple-Google agreement. This agreement was reached with the assistance of Mr. Campbell, who was Intuit's Board Chairman, a friend of Mr. Jobs, and an advisor to Google. The Apple-Google agreement was discussed at Google Board meetings, at which both Mr. Campbell and Paul Otellini (Chief Executive Officer of Intel and Member of the Google Board of Directors) were present. ECF No. 819-10 at 47. After discussions between Mr. Brin and Mr. Otellini and between Mr. Schmidt and Mr. Otellini, Intel was added to Google's do-not-cold-call list. Mr. Campbell then used his influence at Google to successfully lobby Google to add Intuit, of which Mr. Campbell was Chairman of the Board of Directors, to Google's do-not-cold-call list. *See* ECF No. 780-6 at 8-9. Moreover, it was a mere two months after Mr. Jobs entered into the Apple-Google agreement that Apple pressured Bruce Chizen (former CEO of Adobe) to enter into an Apple-Adobe agreement. ECF No. 291-17. As this discussion demonstrates, Mr. Jobs and Mr. Campbell were the individuals most closely linked to the formation of each step of the alleged conspiracy, as they were present in the process of forming each of the links.

In light of the overlapping nature of this small group of executives who negotiated and enforced the anti-solicitation agreements, it is not surprising that these executives knew of the other bilateral agreements to which their own firms were not a party. For example, both Mr. Brin and

Mr. Schmidt of Google testified that they would have told Mr. Otellini of Intel that Google had an anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure we would have mentioned it[.]"); ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr. Otellini's membership on Google's board. ECF No. 771 at 4. Moreover, Google recruiters knew of the Adobe-Apple agreement. *Id.* (Google recruiter's notation that Apple has "a serious 'hands-off' policy with Adobe"). In addition, Mr. Schmidt of Google testified that it would be "fair to extrapolate" based on Mr. Schmidt's knowledge of Mr. Jobs, that Mr. Jobs "would have extended [anti-solicitation agreements] to others." ECF No. 638-8 at 170. Furthermore, it was this same mix of top executives that successfully and unsuccessfully attempted to expand the agreement to other companies in Silicon Valley, such as eBay, Facebook, Macromedia, and Palm, as discussed above, suggesting that the agreements were neither isolated nor one off agreements.

In addition, the six bilateral agreements contained nearly identical terms, precluding each pair of Defendants from affirmatively soliciting any of each other's employees. ECF No. 531 at 30. Moreover, as discussed above, Defendants recognized the similarity of the agreements. For example, Google lumped together Apple, Intel, and Intuit on Google's "do-not-cold-call" list. Furthermore, Google's "do-not-cold-call" list stated that the Apple-Google agreement and the Intel-Google agreement commenced on the same date. Finally, in an email, Lori McAdams (Pixar Vice President of Human Resources and Administration), explicitly compared the anti-solicitation agreements, stating that "effective now, we'll follow a gentleman's agreement with Apple that is similar to our Lucasfilm agreement." ECF No. 531 at 26.

As to the contention that Plaintiffs would have to rebut Defendants' contentions that the anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no documentary evidence that links the anti-solicitation agreements to any collaboration. None of the documents that memorialize collaboration agreements mentions the broad anti-solicitation agreements, and none of the documents that memorialize broad anti-solicitation agreements

mentions collaborations. Furthermore, even Defendants' experts conceded that those closest to the collaborations did not know of the anti-solicitation agreements. ECF No. 852-1 at 8. In addition, Defendants' top executives themselves acknowledge the lack of any collaborative purpose. For example, Mr. Chizen of Adobe admitted that the Adobe-Apple anti-solicitation agreement was "not limited to any particular projects on which Apple and Adobe were collaborating." ECF No. 962-7 at 42. Moreover, the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting." ECF No. 93-1 ¶ 16; ECF No. 93-4 ¶ 7. The DOJ concluded that Defendants entered into agreements that were restraints of trade that were per se unlawful under the antitrust laws. ECF No. 93-1 ¶ 35; ECF No. 93-4 ¶ 3. Thus, despite the fact that Defendants have claimed since the beginning of this litigation that there were pro-competitive purposes related to collaborations for the anti-solicitation agreements and despite the fact that the purported collaborations were central to Defendants' motions for summary judgment, Defendants have failed to produce persuasive evidence that these anti-solicitation agreements related to collaborations or were pro-competitive.

IV. CONCLUSION

This Court has lived with this case for nearly three years, and during that time, the Court has reviewed a significant number of documents in adjudicating not only the substantive motions, but also the voluminous sealing requests. Having done so, the Court cannot conclude that the instant settlement falls within the range of reasonableness. As this Court stated in its summary judgment order, there is ample evidence of an overarching conspiracy between the seven Defendants, including "[t]he similarities in the various agreements, the small number of intertwining high-level executives who entered into and enforced the agreements, Defendants' knowledge about the other agreements, the sharing and benchmarking of confidential compensation information among Defendants and even between firms that did not have bilateral anti-solicitation agreements, along with Defendants' expansion and attempted expansion of the

anti-solicitation agreements." ECF No. 771 at 7-8. Moreover, as discussed above and in this Court's class certification order, the evidence of Defendants' rigid wage structures and internal equity concerns, along with statements from Defendants' own executives, are likely to prove compelling in establishing the impact of the anti-solicitation agreements: a Class-wide depression of wages.

In light of this evidence, the Court is troubled by the fact that the instant settlement with Remaining Defendants is proportionally lower than the settlements with the Settled Defendants. This concern is magnified by the fact that the case evolved in Plaintiffs' favor since those settlements. At the time those settlements were reached, Defendants still could have defeated class certification before this Court, Defendants still could have successfully sought appellate review and reversal of any class certification, Defendants still could have prevailed on summary judgment, or Defendants still could have succeeded in their attempt to exclude Plaintiffs' principal expert. In contrast, the instant settlement was reached a mere month before trial was set to commence and after these opportunities for Defendants had evaporated. While the unpredictable nature of trial would have undoubtedly posed challenges for Plaintiffs, the exposure for Defendants was even more substantial, both in terms of the potential of more than $9 billion in damages and in terms of other collateral consequences, including the spotlight that would have been placed on the evidence discussed in this Order and other evidence and testimony that would have been brought to light. The procedural history and proximity to trial should have increased, not decreased, Plaintiffs' leverage from the time the settlements with the Settled Defendants were reached a year ago.

The Court acknowledges that Class counsel have been zealous advocates for the Class and have funded this litigation themselves against extraordinarily well-resourced adversaries. Moreover, there very well may be weaknesses and challenges in Plaintiffs' case that counsel cannot reveal to this Court. Nonetheless, the Court concludes that the Remaining Defendants should, at a minimum, pay their fair share as compared to the Settled Defendants, who resolved their case with Plaintiffs at a stage of the litigation where Defendants had much more leverage over Plaintiffs.

For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Preliminary Approval of the settlements with Remaining Defendants. The Court further sets a Case Management Conference for September 10, 2014 at 2 p.m.

IT IS SO ORDERED.

Dated: August 8, 2014

LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California

JUNE 19, 2014 HEARING TRANSCRIPT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION,	C-11-02509 LHK
	SAN JOSE, CALIFORNIA
	JUNE 19, 2014
THIS DOCUMENT RELATES TO: ALL ACTIONS	PAGES 1-76

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

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TRANSCRIPT PRODUCED WITH COMPUTER

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SAN JOSE, CALIFORNIA JUNE 19, 2014

P R O C E E D I N G S

01:50PM (COURT CONVENED AT 1:50 P.M.)

01:50PM THE CLERK: CALLING CASE NUMBER C-11-02509 LHK, IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION.

01:50PM MS. DERMODY: GOOD AFTERNOON, YOUR HONOR. KELLY DERMODY FROM LEIFF CABRASER. WITH ME ARE MY PARTNERS, BRENDAN GLACKIN AND DEAN HARVEY.

01:50PM MR. SAVERI: GOOD AFTERNOON, YOUR HONOR. JOSEPH SAVERI.

01:50PM MR. GIRARD: GOOD AFTERNOON. I'M DAN GIRARD APPEARING FOR CLASS REPRESENTATIVE MICHAEL DEVINE.

01:51PM THE COURT: OKAY.

01:51PM MR. VAN NEST: GOOD AFTERNOON, YOUR HONOR. BOB VAN NEST, KEKER & VAN NEST, HERE FOR GOOGLE, AND I'M HERE WITH JUSTINA SESSIONS.

01:51PM THE COURT: OKAY.

01:51PM MR. RILEY: GOOD AFTERNOON, YOUR HONOR. GEORGE RILEY OF O'MELVENY & MYERS. I REPRESENT APPLE. I'M HERE WITH MY COLLEAGUE, CHRISTINA BROWN.

01:51PM MS. KAHN: GOOD AFTERNOON. LIN KAHN FROM JONES DAY ON BEHALF OF ADOBE.

01:51PM MR. PERRY: AND STEVE PERRY FROM MUNGER TOLLES FOR INTEL.

01:51PM THE COURT: OKAY. GOOD AFTERNOON TO EVERYONE AND

01:51PM WELCOME.

01:51PM HOW MANY OPT OUTS TO THE LITIGATION CLASS WERE --

01:51PM MS. DERMODY: YOUR HONOR, WE CAN GET THAT NUMBER FOR YOU. IT WAS NOT VERY MANY.

01:51PM THE COURT: OKAY. HOW MANY OPT OUTS WERE THERE TO

01:52PM THE LUCASFILM/PIXAR SETTLEMENT?

01:52PM MS. DERMODY: I THINK IT WAS 160, SOMEWHERE IN THERE, 155 OR SOMETHING LIKE THAT, YOUR HONOR. IT WAS IN YOUR ORDER.

01:52PM AND THERE WERE NOT THAT MANY MORE THAT WERE JUST LITIGATION. IT WAS DE MINIMIS.

01:52PM THE COURT: OKAY. WHAT ABOUT FOR INTUIT CLASS? ARE

01:52PM THOSE --

01:52PM MS. DERMODY: I MEAN ALL TOGETHER.

01:52PM THE COURT: IF I REMEMBER, THOSE WERE THE SAME.

01:52PM MS. DERMODY: YES.

01:52PM THE COURT: THEY OPTED OUT OF BOTH. BUT DID THEY

01:52PM ALSO OPT OUT OF THE LITIGATION CLASS SIMULTANEOUSLY, OR NOT?

01:52PM MS. DERMODY: THERE WERE SOME THAT DID. IT WAS KIND

01:52PM OF A MIX, DIFFERENT BUCKETS. THERE WERE MOSTLY PEOPLE THAT IF

01:52PM THEY OPTED OUT, THEY OPTED OUT OF THE SETTLEMENTS OF THE PIXAR,

01:52PM LUCAS, AND INTUIT, AND THEN THERE WERE SOME ADDITIONAL ONES

01:52PM THAT OPTED OUT OF THE LITIGATION THAT WAS ONGOING.

01:52PM THE COURT: SO YOU DON'T KNOW THE NUMBER OF THE

01:52PM LITIGATION OPT OUTS AT THIS TIME?

01:52PM MS. DERMODY: ONLY THAT IT WAS RELATIVELY NOT THAT

01:52PM MANY MORE PEOPLE, YOUR HONOR. IT WAS A SMALL NUMBER OF PEOPLE.
01:52PM MAYBE YOU ALL REMEMBER IT BETTER THAN I DO, BUT IT WAS
01:52PM TOTAL --
01:52PM THE COURT: DOES ANYBODY KNOW?
01:52PM MS. DERMODY: TOTAL OPT OUTS? IT WAS IN THE LOW
01:53PM HUNDREDS. WE CAN GET THAT RIGHT NOW.
01:53PM THE COURT: IS THAT GOING TO COUNT TOWARDS THE 4
01:53PM PERCENT OPT OUTS?
01:53PM MS. DERMODY: IT'S NOT, YOUR HONOR, NO. THIS WOULD
01:53PM BE 4 PERCENT ON TOP OF WHAT HAS ALREADY BEEN AN OPT OUT NUMBER.
01:53PM AND GIVEN THE --
01:53PM THE COURT: I GUESS I DON'T UNDERSTAND. 4 PERCENT ON
01:53PM TOP OF IT --
01:53PM MS. DERMODY: SO THERE ARE SOME PEOPLE THAT ARE NO
01:53PM LONGER IN THE CLASS BECAUSE THEY'VE OPTED OUT. AS THE CASE IS
01:53PM CURRENTLY COMPOSED, THOSE PEOPLE DO NOT EXIST IN THE CASE
01:53PM ANYMORE.
01:53PM THE COURT: UM-HUM.
01:53PM MS. DERMODY: THE PRO RATA REDUCTION THAT YOU SAW,
01:53PM YOUR HONOR, IN THE SETTLEMENT AGREEMENT WOULD ONLY KICK IN IF
01:53PM THEY KNEW 4 PERCENT, SOMETHING IN EXCESS OF 2500 PEOPLE NOW, IN
01:53PM ADDITION, OPTED OUT.
01:53PM SO IT WOULD BE A SIGNIFICANTLY LARGER, EXPONENTIALLY
01:53PM LARGER NUMBER OF PEOPLE THAN OPTED OUT THE FIRST TIME.
01:53PM THE COURT: YOU KNOW, THE SETTLEMENT WITH LUCASFILM,

01:53PM PIXAR, AND INTUIT DIDN'T HAVE THIS 4 PERCENT REVERTER. WHY --
01:54PM IN SOME SENSES, LUCASFILM AND PIXAR, AS WELL AS INTUIT, ARE
01:54PM PAYING MORE OF THEIR -- A HIGHER PROPORTION OF THEIR LIABILITY
01:54PM THAN GOOGLE, APPLE, INTEL, AND ADOBE. WHY IS THAT?
01:54PM MS. DERMODY: THERE WAS A PRO RATA REDUCTION THAT
01:54PM WOULD KICK IN THAT WAS SET FORTH IN THOSE OTHER SETTLEMENT
01:54PM AGREEMENTS. IT WAS A -- I THINK IT WAS 10 PERCENT OR SOMETHING
01:54PM IN PIXAR, LUCAS, AND INTUIT. SO THE CONCEPT EXISTED IN THE
01:54PM PRIOR SETTLEMENT AGREEMENTS.
01:54PM HERE WE -- IT JUST WAS DIFFERENT DEFENDANTS, DIFFERENT
01:54PM NEGOTIATIONS, DIFFERENT TERMS THAT WERE BEING DISCUSSED.
01:54PM AND SO WE HAD THE SAME CONCEPT, THAT THERE BE SOME NUMBER
01:54PM OF PEOPLE -- THERE WAS SOME PRICE POINT AT WHICH, FOR THE
01:54PM DEFENDANTS TO HAVE TO PAY, FROM THEIR POINT OF VIEW, HAVE TO
01:54PM PAY INTO A CLASS FUND WHILE LEAVING OPEN THE LIABILITY OF
01:54PM THOUSANDS OF PEOPLE SEEMED TO BE, AS THEY EXPRESSED IT,
01:54PM SOMETHING THAT SHOULD BE ACCOUNTED FOR.
01:55PM SO IT WOULDN'T BE LESS CONSIDERATION TO THE CLASS. IT
01:55PM WOULD BE JUST A PRO RATA REDUCTION THAT WOULD KICK IN. THE
01:55PM SAME NUMBER OF PEOPLE WOULD HAVE THE SAME NET RESULT OF THE
01:55PM CASE IF YOU HIT A CERTAIN THRESHOLD, AGAIN, ONE THAT I, AS
01:55PM CLASS COUNSEL, DON'T THINK WILL BE REACHED, BUT WHICH IS KIND
01:55PM OF A BACKSTOP FOR THE DEFENDANTS IN THE EVENT THAT IT IS.
01:55PM THE COURT: OKAY. I'M UNCLEAR. YOU'RE SAYING THERE
01:55PM WAS A 10 PERCENT REVERTER IN THE LUCASFILM, PIXAR, AND INTUIT

01:55PM SETTLEMENT?
01:55PM MS. DERMODY: THERE WAS A --
01:55PM THE COURT: I DON'T HAVE THAT.
01:55PM MS. DERMODY: IT'S IN THE SETTLEMENT AGREEMENT, YOUR
01:55PM HONOR. WE CAN PULL IT UP.
01:55PM THE CONCEPT OF THERE BEING A PRO RATA REDUCTION FOR A
01:55PM CERTAIN NUMBER OF OPT OUTS AND THE CONCEPT OF THERE BEING A
01:55PM TERMINATION POSSIBILITY WITH A CERTAIN NUMBER OF OPT OUTS WAS
01:55PM SOMETHING THAT HAPPENED IN THE PRIOR SETTLEMENT AGREEMENTS.
01:55PM THE COURT: OH, OKAY. CAN I SEE THAT? BECAUSE I'M
01:55PM SORRY, I DON'T RECALL THAT.
01:55PM MS. DERMODY: YES, YOUR HONOR. WE'LL FIND THAT FOR
01:55PM YOU. I'M AFRAID I DON'T HAVE IT IN FRONT OF ME. I DIDN'T
01:56PM BRING THAT WITH ME TODAY.
01:56PM THE COURT: OKAY.
01:56PM MS. DERMODY: BUT WE'LL LOCATE IT.
01:56PM THE COURT: OKAY.
01:56PM MS. DERMODY: AND IF IT WOULD HELP YOUR HONOR --
01:56PM THE COURT: IS PARVES SYED MOHAMED OBJECTING? I KNOW
01:56PM YOU HAD A FOOTNOTE IN YOUR MOTION THAT YOU DIDN'T THINK THAT HE
01:56PM WAS. WHAT DID YOU BASE THAT ON?
01:56PM MS. DERMODY: A CONVERSATION WITH HIM, YOUR HONOR.
01:56PM AT THE TIME THAT WE -- AFTER WE REVIEWED THAT LETTER, WE SPOKE
01:56PM WITH HIM. IT WAS OUR UNDERSTANDING THAT HE HAD AN INTENT TO
01:56PM WITHDRAW THAT OBJECTION.

01:56PM TO DATE THAT HASN'T HAPPENED. I DON'T KNOW WHETHER OR NOT
01:56PM HE CONTINUES TO WANT TO WITHDRAW THAT OBJECTION OR CONTINUES TO
01:56PM WANT TO SAY THAT HE WANTS THERE TO BE MORE MONEY IN THE
01:56PM SETTLEMENT. I'M NOT SURE EITHER WAY.
01:56PM THE COURT: OKAY. AND IS MR. MOHAMMED HERE TODAY?
01:56PM ALL RIGHT. LET ME GIVE MR. GIRARD AN OPPORTUNITY TO
01:56PM RESPOND TO THE PLAINTIFFS' REPLY.
01:57PM I'D ALSO LIKE TO ASK WHETHER MR. DEVINE ACTUALLY SENT THAT
01:57PM MAY 11, 2014 LETTER TO THE COURT, BECAUSE I NEVER GOT IT. DO
01:57PM YOU KNOW IF HE ACTUALLY SENT IT?
01:57PM MR. GIRARD: I DO NOT KNOW THE ANSWER TO THAT
01:57PM QUESTION AS TO WHETHER IT WAS ACTUALLY SENT. I BELIEVE IT WAS
01:57PM FROM SPEAKING WITH HIM. AND IF YOU'D LIKE TO SEE IT, WE WILL
01:57PM PRODUCE IT TO THE COURT.
01:57PM WE HAVE TALKED WITH MR. DEVINE AT LENGTH AND COUNSELLED
01:57PM HIM ON THE ISSUES SURROUNDING THE APPROVAL OF CLASS ACTION
01:57PM SETTLEMENTS, AND THE OPPOSITION TO THE MOTION FOR PRELIMINARY
01:57PM APPROVAL THAT WAS FILED ON HIS BEHALF REFLECTS HIS POSITION IN
01:57PM OPPOSITION AND IT SUPERSEDES THE LETTER.
01:57PM SO THESE ARE THE ARGUMENTS THAT HE IS ELECTING TO PUT
01:57PM FORWARD IN OPPOSITION TO THE SETTLEMENT, AND I'M PREPARED TO
01:57PM SPEAK TO THOSE IF THIS IS THE RIGHT TIME FOR THAT.
01:57PM THE COURT: YES. I WOULD LIKE TO HEAR YOUR RESPONSE
01:57PM TO THE PLAINTIFFS' REPLY.
01:57PM MR. GIRARD: SURE.

01:57PM THE COURT: OKAY.

01:57PM MR. GIRARD: SO TO START WITH, THE ARGUMENT IS MADE
01:58PM THAT THE SETTLEMENT IS LARGE, PUT IT THAT WAY, $324.5 MILLION,
01:58PM AND IT IS INDISPUTABLY A VERY LARGE AMOUNT OF MONEY.
01:58PM THE PERSPECTIVE THAT MR. DEVINE IS APPROACHING IS HIS
01:58PM PERSPECTIVE AS AN INDIVIDUAL. IT'S NOT LOOKING BACK AND
01:58PM SAYING, "IS IT OR ISN'T IT A BIG AMOUNT OF MONEY?"
01:58PM HIS PERSPECTIVE IS THAT WHAT THIS REPRESENTS FOR HIM IS
01:58PM AROUND $3500 TO $3600, AND FOR THAT PRICE, IF YOU ASKED HIM,
01:58PM "WOULD YOU BE WILLING TO GIVE THE DEFENDANTS THE RIGHT TO
01:58PM MANIPULATE THE MARKET FOR THE SERVICES HE PROVIDES FOR FOUR
01:58PM YEARS FOR $3600, OR WOULD YOU PREFER TO TAKE YOUR CHANCES,
01:58PM KNOWING THAT YOU MIGHT LOSE THAT MONEY, BUT YOU MIGHT ALSO GET
01:58PM A LOT MORE?"
01:58PM AND SPECIFICALLY HERE WE THINK THAT IF THE PLAINTIFFS WIN
01:58PM UNDER THEIR MODEL, THAT LOT MORE IS $144,000, APPROXIMATELY.
01:59PM I THINK, IF HE'S RATIONAL, HIS ANSWER -- AND HE IS -- AND
01:59PM HIS ANSWER IS, "WHAT ARE MY CHANCES? ARE MY CHANCES 97 AND A
01:59PM HALF PERCENT THAT I WILL DO WORSE THAN THIS $3600?"
01:59PM AND HE SAYS, "GIVEN THOSE ODDS, I DON'T THINK SO. I'LL
01:59PM TAKE MY CHANCES ON AN INDIVIDUAL LEVEL."
01:59PM AND HE'S HERE SPEAKING FOR THAT PERSPECTIVE, WHICH IS THAT
01:59PM HE'S PREPARED TO PUT THIS AMOUNT OF MONEY AT RISK BECAUSE THE
01:59PM AMOUNT THAT HE GETS SPECIFICALLY INDIVIDUALLY, NOTWITHSTANDING
01:59PM HOW BIG THE SETTLEMENT IS, IS INSUFFICIENT, IN HIS MIND, IN

01:59PM RELATION TO WHAT HE STANDS TO GAIN IF THIS CASE GOES FORWARD.
01:59PM NOW, IT'S TRUE THAT THE AMOUNT OF MONEY THAT COUNSEL
01:59PM OBTAINED -- AND TO BE CLEAR, THIS IS AN OBJECTION TO THE
01:59PM SUFFICIENCY OF THE RECOVERY. IT'S NOT AN OBJECTION TO THE
01:59PM ADEQUACY OF REPRESENTATION. SO WE'RE NOT CLAIMING THAT COUNSEL
01:59PM WAS -- SOLD OUT THE CASE BECAUSE THEY GOT TOGETHER WITH THE
01:59PM DEFENDANTS AND ENTERED INTO A COLLUSIVE SETTLEMENT. THAT
02:00PM WOULDN'T BE A SERIOUS CLAIM AND THAT'S NOT THE CLAIM BEING
02:00PM MADE. THE CLAIM GOES SOLELY TO THE SUFFICIENCY OF THE
02:00PM RECOVERY.
02:00PM AND THE ARGUMENT THAT MR. DEVINE MAKES IS THAT IF YOU LOOK
02:00PM AT THIS SETTLEMENT, YES, IT'S TRUE THAT IT'S 325 MILLION, BUT I
02:00PM CAN'T THINK OF ANY OTHER TYPE OF CASE THAT HAD THIS TYPE OF
02:00PM EVIDENCE THAT WAS THIS CLOSE TO TRIAL.
02:00PM SO, YES, IT'S A LOT OF MONEY. BUT IT'S ALSO A VERY, VERY
02:00PM STRONG CASE, AND WHERE WE ARE HERE IS PRELIMINARY APPROVAL.
02:00PM AND WE KNOW WHAT'S GOING TO HAPPEN HERE. IF THE COURT
02:00PM ENTERS AN ORDER PRELIMINARILY APPROVING THE SETTLEMENT, NOTICE
02:00PM WILL GO OUT AND SOME NUMBER OF CLASS MEMBERS WILL OBJECT TO THE
02:00PM SETTLEMENT AND CLASS COUNSEL WILL SAY THAT NUMBER, WHATEVER IT
02:00PM IS, IS SMALL IN RELATION TO THE TOTAL NUMBER OF CLASS MEMBERS,
02:00PM AND THEY'LL PROBABLY BE RIGHT AND IT'S A LEGITIMATE ARGUMENT
02:00PM AND I'VE MADE IT MANY TIMES AS CLASS COUNSEL.
02:00PM BUT I THINK THE TREND IS TO TAKE THE HARD LOOK NOW RATHER
02:00PM THAN DEFER TO FINAL APPROVAL, BECAUSE IF YOU ENTER PRELIMINARY

02:00PM APPROVAL NOW, THE WRITING IS ON THE WALL THAT WE'LL GET TO THAT
02:01PM POINT AND THEY'LL SAY IT'S A SMALL AMOUNT AND, THEREFORE, THE
02:01PM MOST -- MOST OF THE CLASS IS HAPPY WITH THE SETTLEMENT AND THE
02:01PM COURT SHOULD APPROVE IT.
02:01PM WHAT'S UNIQUE ABOUT THIS CASE, I THINK -- AND PLAINTIFFS'
02:01PM COUNSEL POINTED OUT THAT MOST OF THE CASES WHERE THE COURTS ARE
02:01PM PUSHING BACK AT PRELIMINARY APPROVAL, A NUMBER OF THOSE CASES
02:01PM INVOLVE FAIRLY QUESTIONABLE SETTLEMENTS AND NOT THE BEST WORK
02:01PM NECESSARILY DONE BY PLAINTIFFS' COUNSEL, AND THAT'S NOT THE
02:01PM ARGUMENT WE'RE MAKING HERE.
02:01PM BUT THIS COURT, IN THIS PARTICULAR CASE, IS UNIQUELY
02:01PM SITUATED TO EXERCISE ITS DISCRETION AT THIS STAGE, AND THIS IS
02:01PM REALLY WHAT PRELIMINARY APPROVAL IS, IS THE COURT ACTING AS A
02:01PM GATEKEEPER.
02:01PM YOU KNOW, WHAT'S INTERESTING ABOUT RULE 23 IS THERE'S
02:01PM NOTHING IN THERE ABOUT PRELIMINARY APPROVAL. WE COULDN'T FIND
02:01PM A SINGLE CIRCUIT LEVEL DECISION WHERE A COURT SAYS THIS IS THE
02:01PM STANDARD THAT YOU, AS A DISTRICT COURT, ARE REQUIRED TO APPLY.
02:01PM THE DISTRICT COURTS REPEAT THE STANDARD GENERALLY THAT THE
02:02PM COURT IS MAKING AN OVERALL ASSESSMENT OF THE FAIRNESS AND
02:02PM LOOKING FOR SIGNS OF COLLUSION.
02:02PM BUT AT THE SAME TIME, THE INSTRUCTION IS TO THIS COURT TO
02:02PM LOOK HARD AND, IF YOU HAVE CONCERNS, TO EXPRESS THOSE CONCERNS
02:02PM NOW.
02:02PM SO WHAT MR. DEVINE'S POSITION IS IS THAT FROM THE

02:02PM PERSPECTIVE OF ANY INDIVIDUAL MEMBER OF THIS CLASS, IF YOU'RE
02:02PM PRESENTED WITH THE BARGAIN OF CONSENTING TO THIS CONDUCT AND
02:02PM ENTERING INTO A RELEASE, IF YOU LOOK AT IT FROM HIS INDIVIDUAL
02:02PM PERSPECTIVE, LIKE A PERSONAL INJURY CASE, IF HE'S GIVEN THE
02:02PM CHOICE OF TAKING $3600 OR PLAYING IT FORWARD FOR THE
02:02PM POSSIBILITY OF DOING A LOT BETTER, AND WHEN YOU LOOK AT THE
02:02PM CONDUCT INVOLVED AND YOU THINK ABOUT WHAT THE DEFENDANTS DID
02:02PM HERE AND HOW THAT AFFECTED THE MARKET FOR THE SERVICES THAT HE
02:02PM AND THE OTHER MEMBERS OF THE CLASS ARE PROVIDING, THAT THEY
02:02PM WOULD PREFER TO TAKE THEIR CHANCES.
02:02PM AND HE'S NOT SAYING -- HE'S NOT SAYING THAT THERE'S NO
02:03PM SETTLEMENT EVER THAT COULD POSSIBLY BE SATISFACTORY TO HIM.
02:03PM HE'S SAYING THAT HE LOOKS AT THIS AND HE THINKS THIS SETTLEMENT
02:03PM IS SHORT OF THE MARK AND THAT IT WOULD BE WORTH IT --
02:03PM THE COURT: HOW MUCH SHORT OF THE MARK DOES HE THINK
02:03PM IT IS?
02:03PM MR. GIRARD: I THINK HE -- HIS CONCERN WAS THAT HE
02:03PM WAS CONCERNED WITH THE PROCESS, TO SOME EXTENT.
02:03PM AND TO ANSWER THAT QUESTION, I GUESS I WOULD -- I WANT TO
02:03PM GIVE A SPECIFIC RESPONSE RATHER THAN AN OVERLY GENERAL ONE.
02:03PM I DON'T THINK WE'RE TALKING ABOUT MULTIPLES OF THIS
02:03PM NUMBER. ONE THOUGHT THAT WE HAD, IN TERMS OF WHAT THIS COURT
02:03PM MIGHT CONSIDER DOING, IS IF THE COURT SHARES ANY OF THESE
02:03PM CONCERNS ABOUT THE SUFFICIENCY OF THE SETTLEMENT, TO GIVE THE
02:03PM PARTIES AN OPPORTUNITY TO GO BACK TO THE TABLE WITH MR. DEVINE

REPRESENTED, ALONG WITH CLASS COUNSEL, AND SEE IF, IN THE CONTEXT OF THE MEDIATION, THE DEFENDANTS ARE WILLING TO PAY ANY MORE IN SETTLEMENT.

IF THE ANSWER IS NO, THEN THE COURT CAN RULE ON THIS MOTION AS IT'S BEEN PRESENTED TO THE COURT.

IF WE'RE ABLE TO COME BACK WITH A SUBSTANTIALLY IMPROVED, OR EVEN A MODESTLY IMPROVED SETTLEMENT, THE COURT WILL HAVE A DIFFERENT CALCULUS IN FRONT OF IT AND PROBABLY A SETTLEMENT THAT ALL THE CLASS REPRESENTATIVES SUPPORT.

THAT'S A PROCESS WE'D BE WILLING TO TAKE ON IF THE COURT IS SO INCLINED.

AND --

THE COURT: WHAT ABOUT MR. DEVINE JUST OPTING OUT AND LITIGATING HIS OWN INDIVIDUAL CASE?

MR. GIRARD: WELL, THAT'S A POSSIBILITY AND WE'VE CERTAINLY TALKED WITH HIM ABOUT THAT.

THE SITUATION FROM HIS POINT OF VIEW, IT'S THE SAME SITUATION THAT WAS DISCUSSED RECENTLY BY THE SUPREME COURT IN THE ITALIAN COLORS CASE ON ARBITRATION. HE'S GOING TO BE LOOKING THEN AT A CLAIM THAT'S WORTH, ON AVERAGE, $140,000 TREBLED, AND HE'S GOING TO BE LOOKING AT EXPENSES FOR EXPERTS THAT ARE GOING TO BE MANY MULTIPLES OF THAT.

SO THE OPT OUT RATE HERE IS A, YOU KNOW, RELATIVELY WEAK EXPEDIENT UNLESS THE VOLUME OF OPT OUTS ARE SUCH THAT IT'S POSSIBLE TO AGGREGATE SOME GROUP OF PEOPLE WHO SHARE THE SAME

VIEW HE HAS AND WANT TO PROCEED.

THE COURT: WHAT ABOUT THE -- WHAT ABOUT THE SPECIFIC ARGUMENTS THAT THE PLAINTIFFS MAKE IN THEIR REPLY THAT, YOU KNOW, MR. -- DR. LEAMER ONLY PROVIDED A DAMAGES ANALYSIS FOR THE OVERARCHING CONSPIRACY, AND IF THE JURY WERE TO FIND THAT ONE OF THE SEVEN DEFENDANTS DIDN'T ACTUALLY JOIN IN THAT CONSPIRACY, THERE WOULDN'T BE SORT OF AN ALTERNATIVE DAMAGES CALCULATION FOR THE JURY TO RELY ON.

MR. GIRARD: SO THEY MADE A NUMBER OF ARGUMENTS LIKE THAT.

THE COURT: YEAH.

MR. GIRARD: AND THERE WAS AN ISSUE ABOUT WHETHER THE COURT WOULD ORDER THAT THE STANDARD IS GOING TO BE PER SE VERSUS RULE OF REASON --

THE COURT: UM-HUM.

MR. GIRARD: -- A NUMBER OF EVIDENTIARY MOTIONS THAT WERE BEFORE THE COURT, AND THE NEED FOR A UNANIMOUS JURY, ET CETERA.

I MEAN, I PUT ALL OF THOSE UNDER THE UMBRELLA GENERALLY OF TRIAL IS RISKY.

THE COURT: UM-HUM.

MR. GIRARD: BUT THIS IS NOT A SITUATION HERE WHERE THE CASE IS, YOU KNOW, AT THE MOTION TO DISMISS STAGE, OR EVEN AT THE SUMMARY JUDGMENT STAGE. I MEAN, WE'RE HERE POST CLASS CERTIFICATION, POST RULE 23, VERY CLOSE TO TRIAL, AND THOSE ARE

ALL FAIR ARGUMENTS.

THE FLIP SIDE IS, WHAT ABOUT THE POSSIBILITY THAT THE DEFENDANTS END UP HAVING TO PAY OVER A BILLION DOLLARS BEFORE TREBLING?

THEY'RE EQUALLY LEGITIMATE POINTS TO CONSIDER.

SO WE'RE NOT -- I MEAN, THIS ISN'T THE OBJECTION WHERE SOMEBODY COMES AND WAVES OFF ALL THE REALITIES AND RISKS OF TRIAL. WE HAVE A TREMENDOUS LEVEL OF APPRECIATION FOR THE WORK THAT'S GONE INTO THIS PROCESS AND HOW HARD COUNSEL HAVE WORKED.

THIS IS REALLY A CLASS REPRESENTATIVE WHO'S SPEAKING UP, DOING THE RIGHT THING IN TERMS OF COMING FORWARD TO THE COURT WITH THE BENEFIT OF HIS EXPERIENCE AND THE THOUGHT AND, TO SOME EXTENT, THE PERSONAL TRAVAIL ALL FOUR OF THESE CLASS REPRESENTATIVES HAVE SUFFERED PROFESSIONALLY FROM HAVING TO TAKE ON THIS INDUSTRY AND THESE DEFENDANTS, AND I THINK THE COST THAT THEY PERCEIVE IN THAT TO THEM AS FAR AS THE PROFESSIONAL CONSEQUENCES THAT THEY MAY SUFFER FOR HAVING BROUGHT THESE CASES AND SAYING, "SOMEHOW WE FEEL LIKE WE'VE BEEN LEFT SHORT HERE, THAT THIS ISN'T THE KIND OF RESULT THAT WE THOUGHT, WHEN WE GOT INTO THIS, WAS WHAT WE WERE LOOKING FOR."

AND, YOU KNOW, YOU THINK ABOUT THIS -- AND I DON'T WANT TO GET TOO PHILOSOPHICAL HERE, SO I'M GOING TO CUT TO THE POINT HERE -- BUT YOU THINK ABOUT THIS COUNTRY AND HOW HARD PEOPLE WORK TO GET THESE TYPES OF JOBS AND HOW IMPORTANT IT IS TO A

LOT OF THE, THE GENERATION OF PEOPLE THAT ARE COMING UP, ENTERING THE WORK FORCE, THE SACRIFICES SOMEBODY LIKE MR. DEVINE MADE, THE LOANS THEY TOOK OUT TO BE EDUCATED AND SO FORTH, AND ANYTHING ABOUT THE RHETORIC THAT IS BEING SOLD BY THE PEOPLE WHO ENTERED INTO THESE AGREEMENTS ABOUT FREE ENTERPRISE AND INDIVIDUAL RESPONSIBILITY AND ON AND ON, AND YOU LOOK AT THE FACT THAT THEY WERE GETTING TOGETHER AND FIXING THE PRICE FOR THESE SERVICES.

I MEAN, I THINK FROM THEIR POINT OF VIEW, IT'S VERY TOUGH TO GIVE IT UP AT THIS POINT FOR THE TRADE THAT I REFERRED TO, THE $3600 FOR THE RIGHT TO FIX THIS MARKET FOR FOUR YEARS.

AND SO THAT'S, THAT'S THE PERSPECTIVE IN WHICH HE IS APPROACHING THE COURT TODAY.

THE COURT: ALL RIGHT. THANK YOU.

LET ME HEAR FROM THE PLAINTIFFS.

MS. DERMODY: YOUR HONOR, DO YOU WANT TO HEAR THE HOUSEKEEPING THINGS FIRST IN RESPONSE TO YOUR QUESTIONS?

THE COURT: SURE. HOW MANY CLASS --

MS. DERMODY: SO FROM --

THE COURT: -- LITIGATION CLASS OPT OUTS WERE THERE?

MS. DERMODY: SIXTY-ONE.

THE COURT: OKAY.

MR. DERMODY: AND IN BOTH THE PIXAR, LUCAS, AND INTUIT SETTLEMENTS, THERE WAS AN ATTACHMENT 1. SO IF YOUR HONOR WAS LOOKING IN THE BODY OF THE SETTLEMENT AGREEMENTS, YOU

02:09PM MIGHT NOT HAVE SEEN IT.
02:09PM BUT IF YOU LOOK TO THE FIRST ATTACHMENT, IT'S IN THERE.
02:09PM IT TALKS ABOUT A PRO RATA REDUCTION, AND IN PIXAR/LUCASFILM IT
02:09PM WAS 10 PERCENT WAS THE THRESHOLD, AND ONCE YOU HAD 10 PERCENT
02:09PM OPT OUTS, THEN YOU WOULD START HAVING A PRO RATA REDUCTION OF
02:09PM THE CLASS CONSIDERATION.
02:09PM THE COURT: WHY IS IT SO MUCH LOWER HERE?
02:09PM MS. DERMODY: I THINK IT'S A DIFFERENT POINT IN THE
02:09PM CASE, DIFFERENT ISSUES IN THE CASE IN TERMS OF CONCERNS ABOUT
02:09PM OPT OUTS, YOUR HONOR.
02:09PM I THINK THAT WAS REALLY ALL THAT WAS GOING ON. I MEAN --
02:09PM THE COURT: OKAY. THE POINT IN THE CASE WOULD
02:09PM ACTUALLY DICTATE FOR A HIGHER NUMBER, RIGHT? I MEAN THE --
02:09PM MS. DERMODY: NOT IF YOU --
02:09PM THE COURT: -- THE LUCASFILM/PIXAR/INTUIT FOLKS
02:10PM SETTLED WHEN I HAD DENIED THE CLASS CERTIFICATION MOTION.
02:10PM SO THESE DEFENDANTS SETTLED AFTER I HAD CERTIFIED THE
02:10PM CLASS, AFTER THE NINTH CIRCUIT HAD REFUSED TO REVIEW MY CLASS
02:10PM CERTIFICATION ORDER, AFTER I HAD DENIED SUMMARY JUDGMENT, AFTER
02:10PM I HAD DENIED THE DAUBERT EXCLUDING DR. LEAMER'S DAMAGES
02:10PM ANALYSIS.
02:10PM MS. DERMODY: RIGHT.
02:10PM THE COURT: SO IF ANYTHING, THAT NUMBER SHOULD BE
02:10PM GOING UP AND NOT GOING DOWN.
02:10PM MS. DERMODY: YOU WOULD THINK, IN GENERAL, THAT WOULD

02:10PM BE TRUE FOR A LOT OF TERMS, YOUR HONOR.
02:10PM THE COURT: UM-HUM.
02:10PM MS. DERMODY: BUT ON THAT PARTICULAR ONE, AT THE TIME
02:10PM OF THE PIXAR/LUCAS SETTLEMENT, AS YOU MIGHT REMEMBER, THERE WAS
02:10PM NO PRIOR PRELIMINARY APPROVAL INFORMATION THAT ANYONE IN THE
02:10PM CLASS MIGHT OBJECT TO THAT SETTLEMENT.
02:10PM WE HAD A DIFFERENT SCENARIO HERE. SO IT WAS A
02:10PM DIFFERENT -- IT WAS JUST A DIFFERENT -- THE PLACE WAS SET
02:10PM DIFFERENTLY FOR THAT PARTICULAR TERM TO BE NEGOTIATED THAN IT
02:10PM WAS AT THE TIME OF THE PIXAR/LUCAS SETTLEMENT, DIFFERENT FACTS
02:10PM IN THE GROUND.
02:10PM THE COURT: OKAY. SO TELL ME THEN WHAT YOU KNEW AT
02:10PM THE TIME YOU SETTLED, BECAUSE MY UNDERSTANDING IS YOU DIDN'T
02:10PM GET THESE OBJECTIONS UNTIL AFTER PEOPLE, SOMEBODY AT "THE
02:11PM NEW YORK TIMES" LEAKED THE 324 MILLION NUMBER.
02:11PM MS. DERMODY: RIGHT. I DON'T KNOW HOW THAT --
02:11PM THE COURT: RIGHT. SO I GUESS I'M UNCLEAR. HOW ARE
02:11PM OBJECTIONS THAT POST-DATED THE ANNOUNCEMENT OF THE SETTLEMENT
02:11PM AMOUNT, THE ONES THAT MOTIVATED THE NUMBER DURING THE
02:11PM SETTLEMENT NEGOTIATIONS THAT PRECEDED THAT NUMBER COMING OUT?
02:11PM MS. DERMODY: WELL, AT THE --
02:11PM THE COURT: DOES THAT MAKE SENSE TO YOU?
02:11PM MS. DERMODY: YES, YOUR HONOR.
02:11PM THE COURT: THAT DOESN'T MAKE SENSE TO ME.
02:11PM MS. DERMODY: I UNDERSTAND THE QUESTION COMPLETELY.

02:11PM I JUST WANT TO MAKE VERY CLEAR TO THE COURT THAT THE
02:11PM PARTIES AGREED THAT THEY WOULD NOT RELEASE ANY OF THE TERMS
02:11PM UNTIL THEY PRESENTED THEM TO YOUR HONOR. NO ONE ON THE
02:11PM PLAINTIFFS' SIDE SPOKE TO ANY MEDIA ABOUT ANY OF THE SPECIFIC
02:11PM TERMS OF THE SETTLEMENT. I DON'T KNOW WHERE "THE NEW YORK
02:11PM TIMES" GOT THEIR INFORMATION. TO THIS DAY, I'M PERSONALLY VERY
02:11PM UPSET THAT THAT INFORMATION WAS OUT THERE BECAUSE THE PARTIES
02:11PM WERE STILL NEGOTIATING THE TERMS OF THE SETTLEMENT AGREEMENT.
02:11PM SO THAT WAS STILL IN PLAY, THAT PARTICULAR TERM, AND THAT
02:11PM PARTICULAR TERM WAS INFORMED BY FEEDBACK THAT HAPPENED, IN PART
02:11PM FROM "THE NEW YORK TIMES," RIGHT AFTERWARDS.
02:11PM SO YOU HAVE TO DEAL WITH THE FACTS IN THE GROUND THAT
02:12PM HAPPENED AT THE TIME YOU'RE NEGOTIATING THOSE TERMS AND THAT IS
02:12PM THE DIFFERENCE.
02:12PM IF THAT TERM ITSELF IS THE STICKING POINT FOR YOUR HONOR,
02:12PM ABSOLUTELY WE'RE GOING TO HAVE TO SORT OF GO AND ADDRESS THAT.
02:12PM BUT I WANT YOUR HONOR TO UNDERSTAND THAT WE WEREN'T
02:12PM DEALING WITH THE EXACT SAME INFORMATION ABOUT OPT OUTS THAT WE
02:12PM WERE WHEN WE NEGOTIATED THE PIXAR/LUCASFILM --
02:12PM THE COURT: I GUESS IT STILL DOESN'T MAKE SENSE TO
02:12PM ME. YOUR JUSTIFICATION FOR THE NUMBER GOING DOWN IS BASED ON
02:12PM OBJECTIONS THAT OCCURRED AFTER YOU HAD ALREADY AGREED TO THE
02:12PM NUMBER.
02:12PM MS. DERMODY: YOUR HONOR, IT'S A -- IT'S A FUNNY
02:12PM POSITION --

02:12PM THE COURT: BECAUSE YOU ANNOUNCED -- YOU SENT THE
02:12PM LETTER TO ME THAT YOU HAD REACHED A SETTLEMENT AT ABOUT THE
02:12PM EXACT SAME TIME.
02:12PM MS. DERMODY: YES, YOUR HONOR.
02:12PM THE COURT: SO I ASSUME WHEN YOU SENT THAT LETTER TO
02:12PM ME, YOU HAD THIS 4 PERCENT NUMBER.
02:12PM MS. DERMODY: NO. WE HAD THE -- I MEAN, YOUR HONOR
02:12PM IS SORT OF ASKING ME TO REVEAL A LOT OF SETTLEMENT PRIVILEGES,
02:12PM SO I'M HAVING A HARD TIME WITH THIS.
02:12PM BUT I WILL TELL YOU THAT --
02:12PM THE COURT: WELL, YOU'RE THE ONE THAT OPENED THE
02:12PM DOOR. YOU'RE THE ONE THAT GAVE THAT AS THE JUSTIFICATION FOR
02:12PM WHY THE NUMBER IS LOWER THAN 10 PERCENT TO 4 PERCENT, RIGHT? I
02:12PM MEAN, IF YOU HADN'T OPENED THE DOOR, I WOULDN'T BE FOLLOWING
02:12PM THIS LINE OF INQUIRY.
02:12PM MS. DERMODY: I WANT TO MAKE SURE THE COURT
02:13PM UNDERSTANDS, BECAUSE I APPRECIATE THE QUESTION. IT'S A
02:13PM COMPLETELY FAIR QUESTION.
02:13PM THE COURT: I GUESS I DON'T UNDERSTAND.
02:13PM MS. DERMODY: THE 324. --
02:13PM THE COURT: THE EARLIER DEFENDANTS SETTLED AT A POINT
02:13PM WHEN THEY HAD MUCH MORE LEVERAGE.
02:13PM THESE DEFENDANTS SETTLED AFTER THEIR LEVERAGE WAS LARGELY
02:13PM GONE. AS SOON AS THE NINTH CIRCUIT SAID, "WE'RE NOT GOING TO
02:13PM REVIEW THIS CLASS CERT ORDER," THEY WERE GOING TO BE FORCED TO

02:13PM GO TO TRIAL, AND I SUSPECT THEY WOULD HAVE WON, IN WHICH CASE
02:13PM THERE WOULD HAVE BEEN AUTOMATIC TREBLING.
02:13PM NOW, GRANTED, I UNDERSTAND THE APPEAL RISKS.
02:13PM BUT IT'S STILL -- FROM A NEGOTIATING STANDPOINT, THESE
02:13PM DEFENDANTS SHOULD HAVE HAD LESS LEVERAGE THAN THE
02:13PM LUCASFILM/PIXAR/INTUIT DEFENDANTS WHO SETTLED WHEN THE ONLY
02:13PM ORDER WAS DENYING THE CLASS CERT MOTION.
02:13PM MS. DERMODY: SO, YOUR HONOR --
02:13PM THE COURT: SO WHY ARE THEY PAYING -- WHY ARE THE
02:13PM EARLIER SETTLING DEFENDANTS BEING PENALIZED BY PAYING A HIGHER
02:13PM PROPORTION OF THEIR DAMAGES LIABILITY THAN THESE DEFENDANTS?
02:13PM MS. DERMODY: WELL, LET ME MAKE IT TOTALLY CLEAR.
02:13PM THE COURT: YEAH.
02:14PM MS. DERMODY: THE PRIOR DEFENDANTS PAID A HUNDRED
02:14PM PERCENT, 100 PERCENT OF WHAT WAS IN THE SETTLEMENT AGREEMENT.
02:14PM WE EXPECT THESE DEFENDANTS WILL PAY 100 PERCENT OF WHAT IS
02:14PM PROMISED IN THE SETTLEMENT AGREEMENT.
02:14PM THE ONLY TIME THAT THERE'S ANY POSSIBILITY THAT THERE WILL
02:14PM BE A PRO RATA REDUCTION IS IF YOU HIT A THRESHOLD OF OVER 2500
02:14PM NEW OPT OUTS AFTER WE HAD 61 THE LAST TIME AROUND.
02:14PM SO THIS IS TALK -- THIS IS SORT OF EXPECTING THE WORST
02:14PM POSSIBLE CASE SCENARIO THAT, BASED ON THE PRIOR SETTLEMENTS --
02:14PM WE DIDN'T KNOW, PRIOR TO THOSE SETTLEMENTS, WHO WOULD OPT OUT.
02:14PM NOW WE HAVE BETTER INFORMATION THAT VERY FEW PEOPLE OPTED
02:14PM OUT LAST TIME AND IT WAS A VERY SMALL SETTLEMENT AMOUNT.

02:14PM THIS TIME, IT'S A MUCH GREATER SETTLEMENT AMOUNT. WE
02:14PM DON'T HAVE ANY EXPECTATION THAT MORE PEOPLE WILL SUDDENLY
02:14PM DECIDE TO EXERCISE THAT OPTION.
02:14PM SO I'M -- I JUST WANT TO MAKE SURE YOUR HONOR UNDERSTANDS
02:14PM THAT THEY'RE NOT GOING TO PAY LESS, NOT UNLESS YOU HAVE A VERY,
02:14PM VERY LARGE NUMBER OF PEOPLE SUDDENLY COMING OUT OF THE WOODWORK
02:14PM TO OPT OUT, WHICH WE HAVE NO REASON TO BELIEVE IS GOING TO BE
02:15PM THE CASE.
02:15PM THE COURT: OKAY. SEPARATE FROM THIS REVERTER,
02:15PM SEPARATE FROM THIS REVERTER, IT DOES APPEAR THAT THESE LATER
02:15PM SETTLING DEFENDANTS ARE PAYING A LOWER PROPORTION OF THEIR
02:15PM POTENTIAL DAMAGES LIABILITY THAN THE EARLIER SETTLING
02:15PM DEFENDANTS, AND IT DOESN'T MAKE SENSE TO ME BECAUSE THEY SHOULD
02:15PM HAVE HAD LESS LEVERAGE THAN THE EARLIER SETTLING DEFENDANTS.
02:15PM MS. DERMODY: I THINK I WOULD DISAGREE WITH THE FIRST
02:15PM ASSUMPTION, YOUR HONOR.
02:15PM THE COURT: OKAY.
02:15PM MS. DERMODY: I DO THINK THAT THERE IS A SIMILAR
02:15PM RATIO IN TERMS OF THE EARLIER DEFENDANTS AND THESE DEFENDANTS,
02:15PM AND I CAN APPRECIATE WHY YOUR HONOR WOULD ASK THE QUESTION THAT
02:15PM YOUR HONOR IS ASKING.
02:15PM AND I THINK FROM OUR PERSPECTIVE, I WANT IT TO BE REALLY
02:15PM CLEAR WHAT WE WERE LOOKING AT AND WHY WE THINK IT WOULD BE
02:15PM MALPRACTICE FOR US, AS CLASS COUNSEL, NOT TO GIVE THE CLASS A
02:15PM CHANCE TO HEAR THAT THEY COULD GET $324.5 MILLION.

02:15PM HERE'S HOW WE SAW THE LAY OF THE LAND, YOUR HONOR. SO
02:16PM WHILE THE NINTH CIRCUIT DID NOT GRANT THE 23(F), AND WE WERE
02:16PM DELIGHTED THAT THAT HAPPENED, THE NINTH CIRCUIT DID NOT GRANT
02:16PM 23(F) AND THEN RULE FOR US, AFFIRM ON THE MERITS.
02:16PM SO FROM OUR PERSPECTIVE, THE ISSUE OF CLASS CERTIFICATION
02:16PM IS STILL AN OPEN ISSUE ON APPEAL. SO THAT ISSUE DOESN'T GET
02:16PM TAKEN OFF THE TABLE BECAUSE OF 23(F) BEING DENIED. THAT'S
02:16PM STILL OUT THERE.
02:16PM THE COURT: RIGHT. BUT WHAT IS YOUR NEGOTIATING
02:16PM POSITION IF YOU HAD GONE TO TRIAL AND YOU HAD WON AND THEN YOU
02:16PM HAD THE APPEAL PROCESS PENDING? YOUR NEGOTIATION LEVERAGE
02:16PM WOULD HAVE INCREASED.
02:16PM MS. DERMODY: ABSOLUTELY, YOUR HONOR.
02:16PM THE COURT: IT WOULD HAVE INCREASED.
02:16PM MS. DERMODY: SO LET'S TALK ABOUT THE TRIAL.
02:16PM THE COURT: LET'S TALK ABOUT THE NINTH CIRCUIT. YOU
02:16PM DON'T THINK, EN BANC, THERE WOULD HAVE BEEN A GOOD -- EN
02:16PM BANC -- THERE WOULD HAVE BEEN A GOOD POSSIBILITY THAT THE CLASS
02:16PM CERT ORDER WOULD HAVE BEEN AFFIRMED?
02:16PM MS. DERMODY: I THINK IT'S A POSSIBILITY.
02:16PM AND THEN WHAT ARE YOUR ODDS IN THE SUPREME COURT, YOUR
02:16PM HONOR?
02:16PM THE COURT: WELL, I THINK IF YOU WANT TO DO AN ORDER
02:16PM THAT RESTRICTS CLASS ACTIONS, I DON'T KNOW IF THIS IS THE
02:16PM POSTER CHILD FOR DOING THAT.

02:16PM WHAT DO YOU THINK? DO YOU THINK THE SUPREME COURT WOULD
02:17PM HAVE WANTED TO DO IT IN THIS CASE? YOU DON'T THINK PERHAPS
02:17PM THERE MIGHT HAVE BEEN A LEGISLATIVE FIX? THIS WOULD HAVE BEEN
02:17PM LIKE A LILLY LEDBETTER SITUATION WHERE THERE MAY HAVE BEEN A
02:17PM LEGISLATIVE RESPONSE?
02:17PM I MEAN, I JUST DON'T THINK THAT THIS IS THE -- IF THERE
02:17PM WERE GOING TO BE A GOOD CASE FOR FURTHER RESTRICTING CLASS
02:17PM ACTIONS, I'M NOT SURE THIS IS THE ONE.
02:17PM MS. DERMODY: IT SOUNDS -- WHAT YOU'RE SAYING, YOUR
02:17PM HONOR, SOUNDS LIKE CONVERSATIONS THAT ME AND MY PARTNERS HAVE
02:17PM AROUND THE CONFERENCE ROOM TABLE ABOUT CASES ALL THE TIME,
02:17PM INCLUDING THIS CASE, AND WHY IT'S SO HARD, WITH A CASE LIKE
02:17PM THIS, TO KNOW WHAT'S THE RIGHT THING TO DO FOR A BUNCH OF
02:17PM ABSENT CLASS MEMBERS WHOSE RIGHTS YOU HOLD IN YOUR HAND BY YOUR
02:17PM NEGOTIATION.
02:17PM AND WHEN YOU HAVE A CASE WHERE YOU CAN RECOGNIZE THAT
02:17PM THERE IS A RISK, YOU HAVE TO TAKE THAT RISK SERIOUSLY. EVEN IF
02:17PM YOU THINK YOU HAVE A GREAT CASE AND IT'S THE MOST WONDERFUL
02:17PM CASE, YOU HAVE TO AT LEAST ACKNOWLEDGE THAT THE RISK EXISTS.
02:17PM THAT'S ONLY ONE RISK. IT IS A RISK. IT MAY NOT BE EVEN
02:17PM THE RISK THAT WE THOUGHT WAS THE GREATEST RISK.
02:17PM I THINK YOUR HONOR MAY HAVE ASSUMED MORE THAN WE DID ABOUT
02:18PM THE LACK OF RISK AT TRIAL, AND WE HAVE DONE JURY TESTING, AS I
02:18PM KNOW THE DEFENDANTS HAVE DONE JURY TESTING -- AS ANYONE I'M
02:18PM SURE THAT COMES BEFORE YOUR HONOR DOES IN A COMPLEX LITIGATION

02:18PM IN THIS COURT -- TO FIND OUT WHAT JURORS THINK ABOUT THIS
02:18PM EVIDENCE, WHAT JURORS THINK ABOUT THESE CLASS MEMBERS, WHAT
02:18PM JURORS THINK ABOUT CERTAIN THEMES THAT ARE IN THIS CASE.
02:18PM AND YOU HAVE TO BE SOBERED WHEN YOU DO THAT KIND OF
02:18PM TESTING TO UNDERSTAND THAT WHILE YOU MIGHT HAVE GREAT EVIDENCE,
02:18PM YOU HAVE TO OVERCOME A NUMBER OF HURDLES.
02:18PM IN THIS CASE, AS THE COURT WELL KNOWS, WE HAD SEVERAL. WE
02:18PM HAVE JURORS HAVE TO FIND UNANIMOUSLY THERE WAS AN OVERARCHING
02:18PM CONSPIRACY AMONG ALL SEVEN COMPANIES; WE HAVE JURORS HAVE TO
02:18PM FIND THAT THERE WAS IMPACT UNANIMOUSLY; AND JURORS HAVE TO COME
02:18PM UP WITH A DAMAGES FIGURE THAT'S GOING TO RIVAL WHAT WE'VE
02:18PM SECURED HERE, THAT IS, A SUM CERTAIN.
02:18PM AND WHEN WE EXPLORE ALL OF THOSE THINGS, THOSE ARE VERY,
02:18PM VERY REAL RISKS FOR PLAINTIFFS, VERY REAL RISKS.
02:18PM AND THE PROBLEM FOR US, AS WE LOOK AT WHAT'S HAPPENED IN
02:19PM OTHER ANTITRUST TRIALS IN THE LAST DECADE, IS THAT IT'S VERY,
02:19PM VERY TOUGH.
02:19PM THE COURT: LET ME ASK YOU A QUESTION. IN YOUR
02:19PM PAPERS, YOU SAY AT LEAST TWICE, OR AT LEAST ONCE, THAT IF ONE
02:19PM OF THE SEVEN DEFENDANTS WAS FOUND NOT TO HAVE PARTICIPATED IN
02:19PM AN OVERARCHING CONSPIRACY, THE DAMAGES WOULD HAVE BEEN ZERO.
02:19PM DO YOU REALLY THINK THAT'S THE CASE? IT WOULD HAVE BEEN ZERO?
02:19PM MS. DERMODY: IF THE -- THAT'S NOT OUR POSITION. I'M
02:19PM SAYING WHAT WE KNOW THE DEFENDANTS WOULD ARGUE, AND WE WOULD
02:19PM HAVE TO PRESENT OUR POSITIONS AGAINST THAT. WE WOULD DISAGREE

02:19PM WITH THAT.
02:19PM BUT THEY WOULD HAVE ARGUMENTS ABOUT THAT BECAUSE OUR
02:19PM THEORY OF THE CASE IS OVERARCHING CONSPIRACY. OUR DAMAGES
02:19PM MODEL REFLECTS AN OVERARCHING CONSPIRACY.
02:19PM THE DEFENDANTS WOULD MAKE ARGUMENTS THAT WE HAVE TO
02:19PM CREDIT, YOUR HONOR.
02:19PM I UNDERSTAND THE COURT'S SKEPTICISM BECAUSE THE COURT
02:19PM KNOWS, AS WE KNOW, WHAT WE'VE UNCOVERED IN THIS CASE.
02:19PM THE COURT: I'VE LOOKED AT -- THROUGH ALL THOSE
02:19PM SEALING REQUESTS, I'VE LOOKED AT MUCH OF THESE DOCUMENTS
02:19PM MYSELF, ALL THE E-MAILS, ALL OF THE REPORTS.
02:20PM SO I'M ASKING YOU, HAVING GONE THROUGH A LOT OF THOSE
02:20PM SEALING REQUESTS, WHICH WAS NOT VERY MUCH FUN, AND KNOWING WHAT
02:20PM A LOT OF THE DOCUMENTS ARE IN THIS CASE, YOU REALLY THINK THE
02:20PM DAMAGES WOULD HAVE BEEN ZERO IF THIS HAD GONE TO TRIAL?
02:20PM I MEAN, I JUST FEEL LIKE THAT IS SUCH A STRETCH.
02:20PM MS. DERMODY: WHAT I'M SAYING TO YOU, YOUR HONOR --
02:20PM THE COURT: YEAH.
02:20PM MS. DERMODY: -- IS THAT THERE IS A RISK.
02:20PM THE COURT: UM-HUM.
02:20PM MS. DERMODY: THERE IS A RISK. THERE'S A RISK THAT A
02:20PM JURY MIGHT FIND THAT THERE WAS NO OVERARCHING CONSPIRACY, AND
02:20PM YET, THEY MIGHT THINK THERE WAS AN IMPACT.
02:20PM A JURY MIGHT FIND THAT THERE WAS AN OVERARCHING CONSPIRACY
02:20PM AND NO IMPACT BECAUSE THE JURY MIGHT CONCLUDE THAT THESE

02:20PM WORKERS ARE AMONG THE MOST DESIRABLE IN THE WORLD AND THEY HAD
02:20PM PLENTY OF OTHER OPPORTUNITY TO GO OTHER PLACES BESIDES THESE
02:20PM SEVEN COMPANIES. JURORS MIGHT CONCLUDE THAT.
02:20PM JURORS MIGHT SAY THERE WAS AN OVERARCHING CONSPIRACY AND
02:20PM THERE WAS SOME IMPACT, BUT WE DON'T LIKE PLAINTIFFS' DAMAGES
02:20PM MODEL, THAT WE ACTUALLY LISTENED TO WHAT THE DEFENDANTS'
02:21PM EXPERTS, SIX ECONOMISTS, ARE GOING TO SAY, AND WE THINK THAT IT
02:21PM WASN'T $3 BILLION. WE THINK IT WAS LESS THAN $1 BILLION. WE
02:21PM THINK IT WAS SOME SMALL FRACTION.
02:21PM THE COURT: WELL THEN, WHY DIDN'T YOU ALL PROPOSE,
02:21PM THEN, A BETTER, MORE ACCURATE, MORE PERSUASIVE DAMAGES MODEL?
02:21PM I MEAN, YOU'RE ALMOST NOW A VICTIM OF YOUR OWN SUCCESS.
02:21PM YOU'RE THE ONES THAT PUT OUT THE 3 BILLION NUMBER. THAT'S WHAT
02:21PM HAS GOTTEN EVERYONE'S EXPECTATIONS SO HIGH. IF YOU ALL HAD NOT
02:21PM BEEN SO AGGRESSIVE WITH YOUR DAMAGES MODEL AND THEORY, PERHAPS
02:21PM WE WOULDN'T BE IN THIS SITUATION, RIGHT? YOU ARE THE ONES WHO
02:21PM HAVE CREATED THE VERY HIGH EXPECTATIONS OF THIS CLASS.
02:21PM MS. DERMODY: WELL, I THINK THAT'S INTERESTING
02:21PM FEEDBACK, YOUR HONOR.
02:21PM WE PUT TOGETHER THE MODEL THAT OUR EXPERT, INDEPENDENTLY,
02:21PM DECIDED WAS THE MODEL TO REFLECT WHAT OUR EXPERT BELIEVED TO BE
02:21PM THE BUT FOR WORLD IF THESE AGREEMENTS HAD NOT EXISTED. THAT
02:21PM WAS OUR EXPERT'S POINT OF VIEW. FULL STOP.
02:22PM WE HAVE TO ACKNOWLEDGE THE RISK THAT A JURY, HEARING A
02:22PM WHOLE BUNCH OF DIFFERENT EXPERTS, EVEN AS WE THINK WE HAVE THE

02:22PM BEST ONE, MIGHT COME TO A DIFFERENT PERSPECTIVE.
02:22PM AND WHILE I WOULD LOVE IT IF I WAS TRYING THIS CASE TO
02:22PM "THE NEW YORK TIMES" EDITORIAL BOARD, THE FACT OF THE MATTER
02:22PM IS, WE WOULD BE TRYING THIS CASE TO THE JURORS THAT ARE HERE
02:22PM AND WE HAVE TO DEAL WITH THE REALITY THAT THOSE JURORS MIGHT
02:22PM NOT SEE IT THE WAY WE SEE IT, OR EVEN HOW YOUR HONOR HAS SEEN
02:22PM THE EVIDENCE. THAT IS JUST A REALITY.
02:22PM SO WHEN WE LOOK AT THOSE THINGS AND WE UNDERSTAND THAT
02:22PM THERE IS SOME RISK AT EACH STEP OF THE WAY THAT WE'RE NOT GOING
02:22PM TO EITHER PREVAIL, OR IF WE PREVAIL, NOT GET THAT AMOUNT OF
02:22PM MONEY, AND WE HAVE IN HAND $324 AND A HALF MILLION ON TOP OF 20
02:22PM MILLION WE'VE ALREADY RECOVERED, AND WE CAN LOOK AT OTHER CASES
02:22PM THAT HAVE BEEN TRIED IN THIS DISTRICT RECENTLY WHERE PEOPLE GOT
02:22PM LESS THAN WHAT WE'RE GETTING AS A PERCENTAGE OF EXPOSURE --
02:22PM THE COURT: OKAY. BUT THAT -- YOU KNOW, UNLESS YOU
02:23PM SHOW ME THE DOCUMENTS IN THOSE LCD-TFD CASES, I JUST DON'T
02:23PM THINK THAT'S USEFUL. THAT'S NOT USEFUL. THAT'S A TOTALLY
02:23PM DIFFERENT CASE.
02:23PM MS. DERMODY: BUT THERE WERE 14 GUILTY PLEAS IN THAT
02:23PM CASE.
02:23PM WE HAD NO GUILTY PLEAS HERE. IN SOME WAYS THAT CASE WAS
02:23PM MUCH MORE COMPELLING ON THE EVIDENCE.
02:23PM I MEAN, THEY'RE APPLES AND ORANGES IN SO MANY RESPECTS,
02:23PM YOUR HONOR.
02:23PM BUT I JUST WANT TO SAY THAT --

02:23PM THE COURT: DO YOU REALLY THINK THAT PRICE FIXING ON
02:23PM TV'S IS MORE COMPELLING THAN THE FACTS OF THIS CASE?
02:23PM MS. DERMODY: WELL, I WILL USE A DIFFERENT CASE THAT,
02:23PM AT LEAST FOR ME, COMPETES WITH THIS ONE FOR BEING COMPELLING,
02:23PM AND THAT'S THE ABBOTT CASE, THE SMITHKLINE BEECHAM CASE THAT
02:23PM WAS BEFORE JUDGE WILKEN THAT WAS A DRUG PRICE FIXING CASE FOR
02:23PM AN AIDS DRUG, AND IN THAT CASE YOU HAVE A HISTORY OF ALLEGED
02:23PM PRACTICE OF PEOPLE ELEVATING --
02:23PM THE COURT: WELL, I STILL DON'T THINK --
02:23PM MS. DERMODY: -- THE PRICE OF AN AIDS DRUG. THE JURY
02:23PM GOT --
02:23PM THE COURT: UNLESS YOU'RE GOING TO GIVE ME ALL THE
02:23PM DOCUMENTATION SO I CAN FAMILIARIZE MYSELF WITH THE FACTS OF
02:23PM THOSE CASES, I JUST DON'T THINK RANDOMLY PULLING OUT OTHER
02:23PM VERDICTS OF OTHER CASES IS REALLY USEFUL.
02:24PM MS. DERMODY: OKAY, YOUR HONOR. I MEAN, IF THERE'S
02:24PM SOMETHING THAT WE COULD SUBMIT TO YOUR HONOR THAT WOULD BE MORE
02:24PM HELPFUL, I WOULD BE REALLY MORE THAN HAPPY TO DO IT.
02:24PM I THINK WHAT WE'RE STRUGGLING WITH IS THAT THE STANDARD
02:24PM HERE IS NOT, YOU KNOW, WHAT MIGHT BE THE BEST POSSIBLE
02:24PM SCENARIO.
02:24PM THE STANDARD HERE IS SORT OF THE RANGE OF REASONABLENESS
02:24PM BASED ON THE RISK IN THIS CASE. AND FROM OUR PERSPECTIVE, AS
02:24PM PEOPLE THAT LIVED AND BREATHED AND SWEATED AND SACRIFICED FOR
02:24PM THIS CASE, AND JUST 100 PERCENT DID EVERYTHING WE COULD FOR

02:24PM THESE CLASS MEMBERS -- I MEAN, HONESTLY, YOUR HONOR, WE HAVE
02:24PM DONE EVERYTHING WE COULD TO DO THIS CASE RIGHT -- WE BELIEVE
02:24PM THAT THIS IS THE RIGHT THING TO DO FOR THE CLASS.
02:24PM WE THINK IT WOULD BE ABSOLUTELY UNETHICAL FOR US TO SEE
02:24PM THAT THERE WAS THIS MUCH MONEY AVAILABLE FOR THE CLASS ON THESE
02:24PM CLAIMS AND TO IGNORE THAT AND GO TO TRIAL KNOWING THAT THERE
02:24PM MIGHT BE A VERY STRONG RISK THAT THE CLASS GETS NOTHING.
02:24PM THAT DID NOT SEEM AT ALL TENABLE TO US, YOUR HONOR, AND WE
02:24PM JUST HAVE PROVIDED THE COURT VARIOUS BENCHMARKS WE THOUGHT
02:25PM WOULD BE USEFUL TO SEE THAT THIS RISK IS SOMETHING THAT OTHER
02:25PM GOOD LAWYERS, OTHER EXPERIENCED LAWYERS HAVE COME TO SIMILAR
02:25PM RISK CALCULATIONS.
02:25PM I MEAN, ONE OF THE MOST INTERESTING COMPARISONS, PERHAPS
02:25PM TO US ONLY, IS WHAT WE PUT FORWARD IN THAT --
02:25PM THE COURT: WASN'T THE LCD-TFT YOUR CASE? WASN'T
02:25PM THAT LEIFF CABRASER?
02:25PM MS. DERMODY: IT WAS OUR CASE.
02:25PM THE COURT: OKAY. WHICH ONE, THE TOSHIBA OR BEST BUY
02:25PM VERSUS HANNSTAR --
02:25PM MS. DERMODY: TOSHIBA. WE TRIED THAT CASE, YOUR
02:25PM HONOR.
02:25PM THE COURT: UM-HUM.
02:25PM MS. DERMODY: AND IN EXHIBIT A TO OUR REPLY BRIEF, WE
02:25PM PUT FORWARD ALL OF THE ANTITRUST EMPLOYEE CLASS ACTIONS THAT WE
02:25PM COULD FIND, AND WE PUT FORWARD WHAT WE UNDERSTAND TO BE THE

02:25PM RESULTS IN THOSE CASES SO YOUR HONOR CAN SEE THEM.
02:25PM AND I THINK WHAT IS INTERESTING IS TO LOOK AT EVEN THE
02:25PM EBAY CASE, WHICH THE CALIFORNIA ATTORNEY GENERAL'S OFFICE
02:25PM PROSECUTED, SOME OF THE BEST LAWYERS IN THE STATE ARE IN THAT
02:25PM OFFICE, REALLY SMART, TALENTED PEOPLE, AND THE RECOVERY IN THAT
02:25PM CASE WAS 1/23RD OF WHAT WE GOT HERE, AND THIS IS 20 -- I SHOULD
02:25PM SAY THIS IS 23 TIMES WHAT THEY GOT THERE.
02:26PM THESE --
02:26PM THE COURT: WELL, UNLESS YOU'RE GOING TO SHOW ME THE
02:26PM DOCUMENTS IN THAT CASE -- I DON'T BELIEVE THERE WAS CLASS CERT
02:26PM IN THAT CASE. I DON'T BELIEVE THERE WAS SUMMARY JUDGMENT IN
02:26PM THAT CASE. I DON'T THINK IT HAD GONE THROUGH THE DAUBERT
02:26PM MOTIONS IN THAT CASE.
02:26PM BUT REGARDLESS, I DON'T FIND IT VERY HELPFUL, UNLESS
02:26PM YOU'RE REALLY GOING TO GIVE ME DEEP INFORMATION ABOUT THOSE
02:26PM CASES, TO SAY, "ALL OF THESE OTHER CASES, BECAUSE I'VE SLAPPED
02:26PM ANTITRUST LABELS ON THEM, ARE COMPARABLE TO THIS."
02:26PM BECAUSE IF WE'RE JUST GOING TO TALK ABOUT RANDOM TRIALS, I
02:26PM CAN DO THAT, TOO. I JUST DON'T THINK -- UNLESS WE GO DEEPLY
02:26PM INTO WHAT THE FACTS ARE TO REALLY SEE IF IT'S COMPARABLE OR
02:26PM NOT, IT'S TOO GENERAL, I THINK.
02:26PM MS. DERMODY: OKAY, YOUR HONOR. WHAT WOULD BE
02:26PM HELPFUL TO THE COURT?
02:26PM THE COURT: SO EXPLAIN TO ME -- I MEAN, YOUR POSITION
02:26PM APPEARS TO BE THAT IF ONE DEFENDANT WAS NOT FOUND TO HAVE

02:27PM PARTICIPATED IN THE OVERARCHING CONSPIRACY, THEN DAMAGES WOULD
02:27PM HAVE BEEN ZERO AND THE CLASS WOULD HAVE GOTTEN NOTHING.
02:27PM BUT I DON'T THINK THAT'S TRUE. YOU ALSO WOULD HAVE THE
02:27PM LEVERAGE TO APPEAL OR, YOU KNOW, THERE WOULD HAVE BEEN ANOTHER
02:27PM SETTLEMENT. IT JUST WOULD HAVE BEEN LATER IN THE PROCESS.
02:27PM MS. DERMODY: SO --
02:27PM THE COURT: AND YOUR LEVERAGE -- ANYWAY, I JUST HAVE
02:27PM CONCERNS ABOUT WHETHER THIS IS REALLY FAIR TO THE CLASS, AND I
02:27PM HAVEN'T MADE A DECISION YET ABOUT WHAT I'M GOING TO DO. I'D
02:27PM LIKE TO THINK ABOUT IT FURTHER.
02:27PM BUT I DO HAVE A CONCERN ABOUT WHETHER THIS IS A SUFFICIENT
02:27PM RECOVERY FOR THE CLASS. I -- YOU KNOW, I AM NOT AT ALL SAYING
02:27PM THAT THE PLAINTIFFS HAVEN'T BEEN ZEALOUS ADVOCATES IN DOING
02:27PM EVERYTHING POSSIBLE FOR THE CLASS, BUT I JUST DO HAVE A
02:27PM QUESTION AND I NEED TO THINK ABOUT IT FURTHER.
02:27PM MS. DERMODY: OKAY, YOUR HONOR.
02:27PM THE COURT: SO IF THERE'S NOTHING MORE THAT YOU WANT
02:28PM TO SAY?
02:28PM NOW, YOU'RE GOING FOR $81 MILLION. WHAT'S YOUR LODESTAR,
02:28PM AND WHY SHOULD THAT GO TO YOU INSTEAD OF THE CLASS?
02:28PM MS. DERMODY: YOUR HONOR, ALL WE'VE SAID IS TO NOTICE
02:28PM THE CLASS THAT WE MIGHT REQUEST UP TO THAT. LAST TIME WE
02:28PM NOTICED THE CLASS AND WE REQUESTED LESS THAN WHAT WE NOTICED.
02:28PM IT'S THE BENCHMARK IN THE NINTH CIRCUIT. WE WOULD THINK
02:28PM IT WOULD BE WARRANTED HERE GIVEN THE WORK IN THIS CASE.

02:28PM THE COURT: WHAT'S YOUR LODESTAR? BECAUSE FROM THE
02:28PM FIRST SETTLEMENT, IT LOOKED LIKE LEIFF CABRASER'S WAS, WHAT,
02:28PM ABOUT 8 MILLION THROUGH OCTOBER OF, YOU KNOW, OCTOBER 30TH OF
02:28PM 2013, 8.4 MILLION.
02:28PM SO WHAT'S THE LODESTAR IF YOU ADD UP ALL THE DIFFERENT LAW
02:28PM FIRMS THAT ARE INVOLVED IN THIS LITIGATION?
02:28PM MS. DERMODY: I DON'T HAVE THAT INFORMATION FOR YOUR
02:28PM HONOR. I'M SORRY.
02:28PM THE COURT: ALL RIGHT. SO FOR THE FIRST SETTLEMENT,
02:28PM NOBODY LOOKED AT THAT FOR THE SETTLEMENT WITH LUCAS FILM,
02:28PM PIXAR, AND INTUIT?
02:28PM MS. DERMODY: I JUST DON'T HAVE THE NUMBERS HANDY FOR
02:28PM YOUR HONOR. I'M SORRY. I DON'T WANT TO MISLEAD THE COURT.
02:29PM THE COURT: OKAY. WELL, YOU KNOW, MR. SAVERI SAID
02:29PM THAT HE WOULD FILE HIS FEES DOCUMENTS FOR THE FIRST SETTLEMENT.
02:29PM I DON'T BELIEVE I GOT THAT.
02:29PM WHAT ARE YOUR LAW FIRM'S -- WHAT'S YOUR LAW FIRM'S --
02:29PM MR. SAVERI: AS OF THE TIME OF THAT, OF THE PRIOR
02:29PM SETTLEMENT, MY FIRM'S LODESTAR WAS APPROXIMATELY $4 MILLION.
02:29PM THE COURT: OKAY. SO -- AND I BELIEVE THAT
02:29PM SETTLEMENT WAS REACHED IN, WHAT, APRIL OF 2013? IS THAT
02:29PM SOMEWHERE AROUND THERE? OR, NO, WHEN WAS THAT? SEPTEMBER?
02:29PM MS. DERMODY: IT WAS APPROVED IN OCTOBER, YOUR HONOR.
02:29PM THE COURT: RIGHT. BUT I -- I GUESS I'M TRYING TO
02:29PM FIGURE OUT, YOU'RE SAYING UP TO THE POINT OF SETTLEMENT, SO

02:29PM WHAT LINE ARE YOU DRAWING HERE? WHAT'S THE DATE,
02:29PM APPROXIMATELY?
02:29PM MR. SAVERI: I BELIEVE IT WAS OCTOBER OF LAST YEAR.
02:29PM THE COURT: OKAY. SO THROUGH -- ALSO THROUGH SOME
02:29PM POINT IN OCTOBER?
02:29PM MR. SAVERI: YEAH.
02:29PM THE COURT: OKAY.
02:29PM MR. SAVERI: AND, YOUR HONOR, SINCE THAT POINT IN
02:29PM TIME, I MEAN, WE DID A LOT OF ADDITIONAL WORK IN THE CASE.
02:29PM THE COURT: SURE.
02:29PM MR. SAVERI: THE LIEFF CABRASER FOLKS DID A LOT OF
02:29PM WORK.
02:29PM THE COURT: SURE.
02:29PM MR. SAVERI: MY OFFICE DID. SO THERE'S ADDITIONAL
02:29PM LODESTAR. I JUST WANT TO BE --
02:29PM THE COURT: YES, I COMPLETELY UNDERSTAND THAT.
02:29PM BUT YOU HAVE NO IDEA WITH REGARD TO -- I BELIEVE THERE
02:30PM ARE, WHAT, AT LEAST THREE OTHER LAW FIRMS?
02:30PM MS. DERMODY: TWO OTHER FIRMS, YOUR HONOR.
02:30PM THE COURT: TWO OTHER FIRMS.
02:30PM MR. SAVERI: I THINK IT'S FAIR TO SAY THAT BETWEEN
02:30PM THE TWO OF US, WE HAVE THE GREAT MAJORITY OF THE TIME IN THIS
02:30PM CASE.
02:30PM THE COURT: SURE, SURE.
02:30PM MR. SAVERI: I MEAN, AND THAT'S CONSISTENT WITH WHAT

02:30PM YOU'VE SEEN IN THE CASE.
02:30PM MS. DERMODY: YEAH. WE CAN GET THE ACTUAL NUMBER.
02:30PM WE HAVE THEIRS.
02:30PM THE COURT: OKAY. THE SETTLEMENT AGREEMENT SAYS THE
02:30PM DEFENDANTS TAKE NO POSITION ON THE SERVICE AWARDS IF THE AWARDS
02:30PM ARE $25,000 OR LESS.
02:30PM NOW, THE PROPOSED SERVICE AWARDS ARE 80,000. DOES THAT
02:30PM MEAN THE DEFENDANTS ARE GOING TO TAKE A POSITION? OR YOU'RE
02:30PM GOING TO REMAIN SILENT?
02:30PM MR. VAN NEST: WE'RE GOING TO REMAIN SILENT, YOUR
02:30PM HONOR.
02:30PM THE COURT: OKAY.
02:30PM MR. VAN NEST: THAT'S UP TO YOUR HONOR'S DISCRETION.
02:30PM THE COURT: OKAY.
02:30PM MR. VAN NEST: I WOULD LIKE TO COMMENT ON THE
02:30PM SETTLEMENT OVERALL WHEN YOUR HONOR GETS TO US THOUGH.
02:30PM THE COURT: ACTUALLY, WHY DON'T WE GO AHEAD AND DO
02:30PM THAT NOW? I HAVE SOME OTHER MORE MECHANICAL QUESTIONS ABOUT
02:30PM THE SETTLEMENT. THOSE CAN WAIT.
02:31PM MR. VAN NEST: SURE.
02:31PM THE COURT: SO -- YEAH.
02:31PM MR. VAN NEST: JUST A COUPLE OF QUICK POINTS.
02:31PM THE COURT: YES.
02:31PM MR. VAN NEST: I THINK YOUR HONOR STARTED WITH THE
02:31PM PREMISE SOMEHOW THAT THE SETTLING DEFENDANTS HERE ARE PAYING A

02:31PM HIGHER PERCENTAGE THAN THE EARLIER -- A LOWER PERCENTAGE.
02:31PM WE DON'T LOOK AT IT THAT WAY AT ALL.
02:31PM THE COURT: OKAY.
02:31PM MR. VAN NEST: AS A MATTER OF FACT, WE THINK WE'RE
02:31PM PAYING A PREMIUM IN THAT IF YOU LOOK AT THE SETTLEMENTS THAT
02:31PM YOU'VE ALREADY APPROVED, YOU APPROVED $20 MILLION SETTLEMENTS.
02:31PM THAT'S ABOUT 8 PERCENT OF THE CLASS.
02:31PM I MEAN, IF YOU DO THE MATH, OUR SETTLEMENT SHOULD HAVE
02:31PM BEEN BELOW $300 MILLION. I MEAN, IF IT'S JUST COMPARABLE, IF
02:31PM WE'RE JUST PAYING WHAT, THE SAME BASIS THAT THAT 20 MILLION
02:31PM PAID, WE WOULD HAVE BEEN IN THE 250 TO 270 TO 280 RANGE.
02:31PM AND BELIEVE ME, AS I THINK YOU KNOW --
02:31PM THE COURT: HOW ARE YOU CALCULATING THAT?
02:31PM MR. VAN NEST: OH, IF YOU JUST -- IF 8 PERCENT OF THE
02:31PM CLASS IS WORTH 20 MILLION, WHAT'S THE OTHER 92 PERCENT WORTH?
02:31PM IT'S NOT 324 MILLION. IT'S A NUMBER SOUTH OF 300.
02:31PM SO OUR POINT IS, AND WE MADE IT REPEATEDLY IN DISCUSSIONS
02:32PM WITH PLAINTIFFS, THAT, YOU KNOW, WE'RE PAYING MORE -- AT THE
02:32PM NUMBERS WE'RE NEGOTIATING NOW, WE'RE PAYING MORE THAN THE FOLKS
02:32PM THAT SETTLED OUT EARLIER, AND IN OUR SITUATION, WE FELT THAT
02:32PM THE BIGGEST RISK IN THIS CASE WAS THE TRIAL ITSELF.
02:32PM AND IF I COULD MAKE JUST A COUPLE OF POINTS ABOUT THIS
02:32PM TRIAL, YOUR HONOR, THAT I THINK ARE SIGNIFICANT?
02:32PM THE COURT: OKAY.
02:32PM MR. VAN NEST: IT IS TRUE THAT DR. LEAMER BASED HIS

DAMAGE MODEL ON AN ALL-IN APPROACH. IT WAS ALL SEVEN DEFENDANTS PARTICIPATING. IF YOU TOOK OUT ONE OR MORE DEFENDANTS, HIS MODEL FELL APART AND IN SOME CASES SHOWED THAT SOME DEFENDANTS HAD OVERCOMPENSATED PEOPLE.

IN OTHER WORDS, HIS MODEL ONLY WORKED -- AND HE CONCEDED THIS, WE'D BE HAPPY TO SUBMIT A SHORT BRIEF ON IT -- HE CONCEDED THAT HIS MODEL WOULDN'T WORK IF NOT ALL DEFENDANTS WERE FOUND TO BE PARTICIPANTS.

NOW, YOUR HONOR RECOGNIZES, AND COUNSEL SAID IT IN HER BRIEF, THAT OBVIOUSLY THESE BILATERAL AGREEMENTS WERE ENTERED INTO OVER A WIDE PERIOD OF TIME, SOME IN DIFFERENT INDUSTRIES, AND SO ONE OF THE BIG RISKS IN THE TRIAL WAS THAT ONE DEFENDANT WOULD BE OUT.

THE COURT: YES.

MR. VAN NEST: THE OTHER BIG RISK --

THE COURT: OKAY. BUT LET'S PLAY THAT OUT. SO WHAT WOULD HAVE HAPPENED? YOU DON'T THINK THE JURORS, ONE POSSIBILITY COULD HAVE BEEN TO TAKE OUT OF DR. LEAMER'S DAMAGES MODEL, OR SOME PERCENTAGE OF THAT MODEL, TAKE OUT THAT PERCENTAGE OF THAT DEFENDANT'S EMPLOYEES? OR YOU'RE SAYING THAT -- YOU'RE SAYING THE JURY COULD HAVE COME UP WITH NOTHING?

MR. VAN NEST: YEAH.

THE COURT: IF THEY DIDN'T ACCEPT IT WHOLE HOG, THEY WOULD COME UP WITH ZERO?

MR. VAN NEST: TWO THINGS.

THE COURT: IS THAT -- I JUST WANT TO KNOW --

MR. VAN NEST: YEAH.

THE COURT: -- WHAT ARE YOU SAYING?

MR. VAN NEST: ABSOLUTELY.

THE COURT: IF THE JURY FOUND THAT ONE, THEY WOULD GO WITH ZERO? BECAUSE I -- I FIND THAT A LITTLE BIT DIFFICULT TO BELIEVE.

MR. VAN NEST: I DON'T.

THE COURT: YOU THINK THAT THE JURY WOULD COME UP WITH ZERO?

MR. VAN NEST: BUT HERE'S THE POINT. THEY HAD AN EXPERT REPORT THAT WAS ONE FLAVOR.

THE COURT: UM-HUM.

MR. VAN NEST: ALL SEVEN IN, HERE'S THE NUMBER.

THE COURT: UM-HUM.

MR. VAN NEST: DR. LEAMER CONCEDED, IN DEPOSITION, "IF YOU TAKE ONE DEFENDANT OUT, MY MODEL DOESN'T WORK."

THEY THEN -- WE THEN WOULD BE ARGUING TO YOUR HONOR, UNDER COMCAST AND ALL THE RECENT SUPREME COURT CASES, THAT THEY DON'T HAVE A DAMAGE MODEL TO GIVE TO THE JURY TO PRODUCE ANYTHING OTHER THAN SPECULATION.

THE COURT: UM-HUM.

MR. VAN NEST: SO DO I THINK I HAD A CHANCE TO PERSUADE THE JURY, GIVEN THAT, THAT THEY SHOULDN'T AWARD DAMAGES BECAUSE THERE WASN'T A BASIS? YOU BET I DO.

BUT I THINK EVEN IF I HADN'T --

THE COURT: YOU WOULD HAVE A JMOL MOTION?

MR. VAN NEST: I WOULD HAVE A GOOD MOTION UNDER COMCAST.

NOW, I DON'T, FRANKLY, THINK THAT THAT'S THE BIGGEST RISK.

THE COURT: YEAH.

MR. VAN NEST: I'LL TELL YOU, I THINK THE BIGGEST RISK IN THIS CASE --

THE COURT: YEAH.

MR. VAN NEST: -- IS THAT THEY HAD A HUGE NUMBER, $3 BILLION, AND THE FACTS ON THE GROUND WERE THAT TECH EMPLOYEES IN THE CLASS WERE PAID WAY ABOVE BOTH THE NATIONAL AND THE REGIONAL AVERAGE, AND THEIR PAY WENT UP, NOT BY A LITTLE, BUT EVERY YEAR IT WENT UP BY MORE THAN IT HAD EITHER BEFORE OR AFTER THE CLASS PERIOD.

SO THERE'S A VERY STRONG ARGUMENT THAT THAT $3 BILLION NUMBER EVERYBODY IS TALKING ABOUT WAS ABSOLUTELY INCONSISTENT WITH THE FACTS ON THE GROUND.

AND WHY DO YOU THINK THAT HE COULD HAVE --

THE COURT: BUT YOU'RE COMPARING THEM, WHAT, LIKE THE PLAINTIFFS JUST TO THE AVERAGE INCOME IN SANTA CLARA COUNTY?

MR. VAN NEST: NO, NO, NO, NO.

THE COURT: BECAUSE THAT'S WHAT THEY DO IN THEIR REPLY BRIEF.

MR. VAN NEST: THEY DO.

THE COURT: THEY JUST SAY, WELL, SANTA CLARA COUNTY, AVERAGE INCOME IS THIS; THEREFORE, THERE WOULD HAVE BEEN A LOT OF RESENTMENT THAT THESE ARE TECH WORK WORKERS THAT ARE MAKING MORE THAN THE AVERAGE INCOME.

MR. VAN NEST: WHAT WE SAID IN OUR DAUBERT --

THE COURT: YEAH.

MR. VAN NEST: -- WAS THAT THEY ARE ABOVE THE NATIONAL AND THE REGIONAL AVERAGE FOR TECH WORKERS. IF YOU LOOK AT TECH WORKERS ON AVERAGE, IN THE NATION OR REGIONALLY HERE, THESE CLASS MEMBERS WERE PAID WAY -- I'M NOT TALKING 1 OR 2 PERCENT -- BUT WAY ABOVE THAT AVERAGE AND THEIR PAY WENT UP.

THE COURT: BUT ISN'T THIS WHERE YOU COME IF YOU ARE A TOP TECH WORKER?

MR. VAN NEST: SURE.

THE COURT: WOULDN'T YOU BE IN SILICON VALLEY --

MR. VAN NEST: ABSOLUTELY.

THE COURT: -- VERSUS IN BROKEN ARROW, OKLAHOMA?

MR. VAN NEST: SURE. MY POINT IS THAT THEIR WHOLE CASE WAS PREMISED ON SOMEHOW PAY BEING SUPPRESSED; AND, YET, IN THE CLASS PERIOD, PAY WENT UP MORE EVERY YEAR THAN IT HAD GONE UP BEFORE OR AFTER.

THE COURT: BUT THE THEORY IS IT COULD HAVE GONE UP EVEN MORE.

MR. VAN NEST: SURE.

THE COURT: AND I DON'T THINK THAT'S INCONSISTENT

02:36PM WITH SAYING TECH WORKERS HERE MAKE MORE THAN TECH WORKERS IN
02:36PM ALABAMA, MAINE, WHEREVER YOU WANT TO TALK ABOUT IT, AND THAT
02:36PM THEIR SALARIES COULD HAVE BEEN EVEN HIGHER.
02:36PM MR. VAN NEST: BUT YOU AND I --
02:36PM THE COURT: I JUST DON'T THINK THAT'S INCONSISTENT.
02:36PM MR. VAN NEST: BUT HOW MUCH DO YOU WANT TO GAMBLE ON
02:36PM THAT? I MEAN, THERE HAVE BEEN A LOT OF BILLION DOLLAR CLAIMS
02:36PM MADE IN OUR DISTRICT --
02:36PM THE COURT: WELL, HOW MUCH DID YOU ALL WANT TO GAMBLE
02:36PM WITH ALL OF THAT INFORMATION COMING OUT? HOW MUCH DID YOU ALL
02:36PM WANT TO GO TO TRIAL ON THIS?
02:36PM MR. VAN NEST: WE BELIEVE --
02:36PM THE COURT: I MEAN, YOU'VE SEEN HOW OUR JURY POOLS
02:36PM ARE HERE IN SAN JOSE. I THINK THEY WOULD HAVE FOUND THESE
02:36PM DOCUMENTS VERY SIGNIFICANT AND PRETTY COMPELLING.
02:36PM MR. VAN NEST: I'M NOT DISAGREEING WITH THAT.
02:36PM THE COURT: THEY WOULD HAVE FOUND A LOT OF THE
02:36PM TESTIMONY VERY COMPELLING. THEY WOULD HAVE FOUND A LOT OF THE
02:36PM E-MAILS VERY COMPELLING.
02:37PM HOW MUCH -- YOU KNOW, I UNDERSTAND WE'RE ALL FOCUSED ON
02:37PM HOW MUCH THE PLAINTIFFS DIDN'T WANT TO GO TO TRIAL.
02:37PM LET'S TALK ABOUT HOW MUCH THE DEFENDANTS DIDN'T WANT TO GO
02:37PM TO TRIAL. HOW MUCH WAS THAT WORTH?
02:37PM MR. VAN NEST: YOU CAN PRICE IT.
02:37PM THE COURT: HOW COME YOU'RE NOT REALLY FOCUSSING ON

02:37PM THAT?
02:37PM MR. VAN NEST: WE PRICED IT. IT'S $324.5 MILLION.
02:37PM IN OTHER WORDS, GIVEN ALL THE RISKS AND GIVEN MONTHS OF
02:37PM WORK WITH JUDGE PHILLIPS, THAT'S WHAT WE -- THAT'S WHAT WE
02:37PM CONCLUDED.
02:37PM THE COURT: IT'S NOT JUST FINANCIAL RISKS. IT'S
02:37PM OTHER DAMAGE THAT YOUR COMPANIES WOULD GET IN TRYING TO RECRUIT
02:37PM OTHER EMPLOYEES AND WHAT THAT WOULD DO TO YOUR IMAGE, TO YOUR
02:37PM GOOD WILL. I MEAN, IT WOULD HAVE HAD A LOT OF COST OTHER THAN
02:37PM JUST STRICTLY MONETARY.
02:37PM MR. VAN NEST: I'M NOT DENYING THAT ONE BIT.
02:37PM BUT YOUR HONOR'S QUESTION, WHAT'S IT WORTH TO US, WE PUT
02:37PM OUR MONEY WHERE OUR MOUTH IS, RIGHT? WE NEGOTIATED FOR A
02:37PM SETTLEMENT AND ACHIEVED A SETTLEMENT THAT IS FAIR AND
02:37PM REASONABLE TO THE CLASS IN LIGHT OF ALL THE RISKS.
02:37PM I'M JUST POINTING OUT THAT THERE ARE LOTS OF RISKS ON THE
02:38PM PLAINTIFFS' SIDE THAT MEAN THERE'S A REAL POSSIBILITY OF EITHER
02:38PM A LOW VERDICT OR NO VERDICT OR A VERDICT THAT DOESN'T REACH THE
02:38PM SETTLEMENT THAT WE'VE ACHIEVED.
02:38PM FOR EXAMPLE, FOR EXAMPLE, WE ALL KNOW THAT YOU CAN COME
02:38PM INTO COURT WITH A BILLION DOLLAR CLAIM AND END UP WITH A LOT
02:38PM LESS MONEY, RIGHT? I MEAN, THAT HAPPENS ALL THE TIME.
02:38PM AND IN THIS PARTICULAR CASE, THE FOCUS THAT YOUR HONOR
02:38PM HAD, BECAUSE THAT'S WHAT WAS PRESENTED, WAS ON THE LIABILITY
02:38PM SIDE, WE HAD SUMMARY JUDGMENT MOTIONS AND ALL THAT, AND A

02:38PM LITTLE BIT ON THE DAMAGES SIDE IN THE DAUBERTS.
02:38PM BUT THE REAL RISK IN THE CASE WAS --
02:38PM THE COURT: WELL, THE DAMAGES ALSO CAME UP A LOT IN
02:38PM THE TWO CLASS CERT ISSUES -- MOTIONS, EXCUSE ME.
02:38PM MR. VAN NEST: TO SOME DEGREE, THEY DID.
02:38PM THE COURT: YEAH.
02:38PM MR. VAN NEST: BUT THAT'S WHERE THERE'S A HUGE RANGE
02:38PM OF RISK, WHICH IS WHY I SAY THE NUMBER THAT WE ACHIEVED IS
02:38PM ABSOLUTELY IN LINE, AND A LITTLE BETTER FOR THE PLAINTIFFS,
02:38PM THAN THE NUMBER THAT WAS ACHIEVED IN THE FIRST SETTLEMENT.
02:38PM SO GIVEN -- GIVEN THAT THAT'S 8 TO 10 PERCENT OF THE CLASS
02:39PM THAT PAID $20 MILLION, IT IS ABSOLUTELY FAIR AND REASONABLE FOR
02:39PM THE REST OF THE -- FOR THE DEFENDANTS EMPLOYING THE REST OF THE
02:39PM CLASS TO PAY THE 324.5 MILLION. IT'S IN LINE WITH IT, IT'S A
02:39PM PREMIUM OVER IT, AND MAYBE THAT'S CONSISTENT WITH THE FACT THAT
02:39PM THE CASE WAS A LITTLE MORE WELL DEVELOPED BY THE TIME IT GOT
02:39PM THERE.
02:39PM BUT I DO THINK THAT WHAT COUNSEL HAS SAID ABOUT THE RISK
02:39PM OF A NO OR LOW VERDICT IS -- CANNOT BE IGNORED OR OVERLOOKED IN
02:39PM THIS CASE GIVEN THE ECONOMIC FACTS ON THE GROUND, AND GIVEN
02:39PM THAT EVEN YOUR HONOR RECOGNIZED THAT DR. LEAMER'S RESULTS AT
02:39PM THAT T-SCORE WEREN'T STATISTICALLY SIGNIFICANT BY ANY MEASURE
02:39PM THAT ANY ECONOMIST, MATHEMATICIAN, OR SCIENTIST HAS EVER
02:39PM APPROVED.
02:39PM AND ALTHOUGH THAT PASSED DAUBERT, IT MIGHT NOT PASS A JURY

02:39PM TO HEAR THAT THIS GUY'S REPORT -- WHICH IS THE ONLY THING THAT
02:40PM GIVES THEM A NUMBER -- WAS NOT STATISTICALLY SIGNIFICANT BY ANY
02:40PM TRADITIONAL MEASURE OF SIGNIFICANCE IN ANY SORT OF SCIENTIFIC,
02:40PM ACADEMIC, MATHEMATIC, OR EVEN INDUSTRIAL COMMUNITY.
02:40PM AND THAT WAS A HUGE, SIGNIFICANT FACT FOR US FOR
02:40PM PRESENTATION TO THE JURY AND, FRANKLY, THE ONLY -- THE ONLY
02:40PM EVIDENCE, IF YOU WANT TO CALL IT THAT, THEY HAD OF THAT NUMBER
02:40PM WAS DR. LEAMER'S OPINION.
02:40PM THERE WASN'T ANY OTHER INTRINSIC EVIDENCE THAT LEADS TO
02:40PM THAT NUMBER. THE INTRINSIC EVIDENCE LEADS TO A SHOWING THAT I
02:40PM MENTIONED OF PAY GOING UP AND BEING ABOVE AVERAGE.
02:40PM SO IF HE DOESN'T HAVE A SIGNIFICANTLY SIGNIFICANT RESULT,
02:40PM WOULD YOU HANG YOUR HAT ON A JURY TRIAL IN THAT SITUATION WHEN
02:40PM YOU HAVE ONE EXPERT PRESENTING DAMAGES WHOSE T-SCORE IS HIGHER
02:40PM THAN ANY OTHER COURT OR VERDICT THAT WE WERE ABLE TO FIND HAS
02:40PM EVER SUPPORTED?
02:40PM I MEAN, THAT'S ANOTHER FACTOR, I THINK, THAT CAUSED, YOU
02:41PM KNOW, THE PARTIES TO COME WHERE THEY DID.
02:41PM NOW, I WILL SAY THAT THIS SETTLEMENT WAS ACHIEVED OVER A
02:41PM QUITE LONG PERIOD OF TIME. IT STARTED WITH MEETINGS, BUT IT
02:41PM CONTINUED FOR MONTHS WITH JUDGE PHILLIPS ACTIVELY INVOLVED AND
02:41PM JUDGE PHILLIPS GUIDING THE PARTIES TO WHERE WE ULTIMATELY ENDED
02:41PM UP.
02:41PM AND WHILE, OF COURSE, THE SETTLEMENT DISCUSSIONS ARE
02:41PM CONFIDENTIAL, I DON'T THINK THERE'S ANY QUESTION THAT YOU HAD

02:41PM KNOWLEDGEABLE, EXPERIENCED COUNSEL ON BOTH SIDES, AND A VERY
02:41PM KNOWLEDGEABLE, EXPERIENCED MEDIATOR WHO WAS WELL AWARE OF ALL
02:41PM OF THESE RISKS AND WHAT'S BEEN HAPPENING AT TRIALS HERE AND
02:41PM AROUND THE COUNTRY.
02:41PM AND, YOU KNOW, TO COME UP WITH THIS NUMBER, WHICH IS, I
02:41PM GUESS, THE SECOND BIGGEST NUMBER IN HISTORY FOR A SETTLEMENT OF
02:41PM THIS KIND, I THINK THAT'S A PRETTY SIGNIFICANT ACHIEVEMENT AND
02:41PM I THINK THAT THE PARTIES DIDN'T COME TO IT OVERNIGHT. IT TOOK
02:41PM A WHOLE LOT OF WORK AND A WHOLE LOT OF TIME AND EFFORT BY A LOT
02:42PM OF PEOPLE TO GET THAT NUMBER DONE.
02:42PM THE ONLY OTHER COMMENT I'LL MAKE IS THAT I THINK YOUR
02:42PM HONOR'S COMMENTS ON THE SO-CALLED PRO RATA, IT -- THIS
02:42PM SETTLEMENT IS A LITTLE BIT DIFFERENT IN THAT THERE'S NO CLAIMS
02:42PM PROCESS. WE'RE JUST GOING TO WRITE CHECKS. WE HAVE THE
02:42PM ADDRESSES. WE HAVE THE IDENTITIES. THERE'S NO CLAIMS PROCESS.
02:42PM SO IT'S NOT A REVERTER IN THE SENSE THAT WE THINK OF
02:42PM REVERSIONS. IT'S A SAFETY VALVE, IF A REALLY HIGH NUMBER OF
02:42PM PEOPLE OPT OUT, TO GIVE THE DEFENDANTS THE FUNDS TO DEAL WITH
02:42PM THOSE OPT OUTS.
02:42PM NOW, I DON'T THINK ANY OF US EXPECT OPT OUTS AT THIS
02:42PM LEVEL. THERE WERE 61 OPT OUTS FROM THE LITIGATION CLASS AND
02:42PM NOT VERY MANY FROM THE SETTLEMENT CLASS.
02:42PM AND SO I THINK THAT THIS REALLY IS A SAFETY VALVE, AND I
02:42PM DON'T THINK IT'S FAIR TO THE PLAINTIFFS, OR US, TO SAY, "WELL,
02:42PM THESE OTHER GUYS, THEIR PRO RATA STARTED AT THIS NUMBER."

02:42PM YOU HAVE TO TAKE THE SETTLEMENT IN ITS ENTIRETY. IN OTHER
02:43PM WORDS, WE DIDN'T NEGOTIATE ONE LITTLE PIECE AT A TIME. THIS
02:43PM WAS ONE SETTLEMENT WITH A LOT OF MOVING PARTS AND A LOT OF
02:43PM ELEMENTS, AND SO MAYBE WE GOT A LITTLE BETTER BLOW PROVISION,
02:43PM YOU KNOW, IN TERMS OF A PRO RATA.
02:43PM BUT WHEN YOU'RE PAYING 324 MILLION, MAYBE YOU'RE ENTITLED
02:43PM TO IT. THOSE GUYS PAID 20 MILLION, AND SO THEIR RISK OF OPT
02:43PM OUTS, WHATEVER IT WAS, YOU KNOW, THEY DIDN'T -- THAT AMOUNT OF
02:43PM MONEY IS SO VASTLY DIFFERENT FROM THE MONEY THAT THESE
02:43PM DEFENDANTS PAID THAT IT'S QUITE NATURAL TO SAY, AND TO EXPECT,
02:43PM THAT A PRO RATA TYPE SAFETY VALVE MIGHT BE DIFFERENT.
02:43PM AND WE DIDN'T NEGOTIATE THIS DEAL FROM THE EARLIER DEAL.
02:43PM THIS SETTLEMENT WAS ACHIEVED BY THESE DEFENDANTS WITH THE
02:43PM PLAINTIFFS BASED ON THE FACTS THAT WE HAD FROM OUR CASE.
02:43PM AND SO WE -- I, FRANKLY, WASN'T EVEN AWARE OF WHAT THEIR
02:43PM PERCENTAGE PRO RATA IN THE LUCASFILM DEAL WAS UNTIL IT CAME UP
02:43PM THIS MORNING. I JUST KNEW THAT, GIVEN THE AMOUNT OF MONEY WE
02:44PM WERE SPENDING TO RESOLVE THIS, AND THE POSSIBILITY THAT I WOULD
02:44PM BE LEFT IN AN EXTREME CASE -- AND IT IS EXTREME -- WITH A LARGE
02:44PM NUMBER OF OPT OUTS, I WANTED, ASKED FOR, AND NEGOTIATED HARD
02:44PM FOR THE RIGHT TO GET SOME SMALL AMOUNT OF MONEY BACK TO DEAL
02:44PM WITH THOSE SO THAT I COULD EITHER TRY OR RESOLVE THOSE CASES.
02:44PM AND THAT'S ALL IT IS. IT'S -- IT'S ONE SMALL PIECE OF A
02:44PM BIGGER RESOLUTION, AND I DON'T THINK IT'S FAIR TO COMPARE, YOU
02:44PM KNOW, THAT PRO RATA TO ANY OTHER BECAUSE OUR SETTLEMENT WAS SO

02:44PM MUCH BIGGER AND MORE SIGNIFICANT THAN THE ONE THAT YOUR HONOR
02:44PM APPROVED A COUPLE OF MONTHS AGO. IT TOOK CARE OF 90-PLUS
02:44PM PERCENT OF THE CLASS, SO IT'S A MUCH BIGGER DEAL FROM THAT
02:44PM PERSPECTIVE.
02:44PM SO I JUST THINK YOU HAVE TO TAKE ALL OF THESE ELEMENTS IN
02:44PM CONTEXT OF THE OVERALL GLOBAL DEAL.
02:44PM THE COURT: WHAT WAS THE NUMBER OF OPT OUTS IN THE
02:44PM LUCASFILM/PIXAR/INTUIT? DO YOU HAVE THAT NUMBER NOW?
02:44PM MR. VAN NEST: SIXTY-ONE --
02:45PM THE COURT: WAS FOR THE LITIGATION CLASS.
02:45PM MR. VAN NEST: -- OPTED OUT OF THE LITIGATION CLASS.
02:45PM THE COURT: YEAH. SO THAT WOULD HAVE BEEN --
02:45PM MR. VAN NEST: IT'S MORE FOR THE SETTLEMENT CLASS,
02:45PM BUT IT'S LESS THAN 200, I THINK.
02:45PM MS. DERMODY: IT'S 147, YOUR HONOR.
02:45PM THE COURT: OKAY. AND THEY ARE THE ONES WHO OPTED
02:45PM OUT OF BOTH THE LUCASFILM, PIXAR, AND INTUIT CLASSES, RIGHT?
02:45PM MS. DERMODY: IT'S THE SETTLEMENT CLASS.
02:45PM THE COURT: THE SETTLEMENT CLASSES.
02:45PM MS. DERMODY: RIGHT. AND THEN 61 JUST OPTED OUT OF
02:45PM THE LITIGATION --
02:45PM THE COURT: OF THE LITIGATION CLASS. OKAY.
02:45PM ALL RIGHT. AND THERE WAS A CLAIM FORM IN THAT SETTLEMENT?
02:45PM MS. DERMODY: THAT'S RIGHT, YOUR HONOR.
02:45PM THE COURT: OKAY. WELL, I WAS HAPPY TO SEE THAT

02:45PM THERE'S NO CLAIM FORM HERE.
02:45PM MR. VAN NEST: WE THINK IT'S BETTER FOR OUR MEMBERS.
02:45PM MS. DERMODY: YEAH. AND WE'VE NOW TESTED THE
02:45PM ADDRESSES, SO WE KNOW WE HAVE VERY GOOD ADDRESSES. WE'VE
02:45PM UPDATED ALL OF THEM ONE TIME ALREADY, SO WE HAVE A GREAT DEAL
02:45PM OF CONFIDENCE WE'LL REACH EVERYONE.
02:45PM THE COURT: SO LET ME -- I HAVE SOME MECHANICAL
02:45PM QUESTIONS.
02:45PM YOU STOOD UP -- MR. GIRARD, LET ME DO MY MECHANICAL
02:45PM QUESTIONS AND THEN I'LL GIVE EVERYBODY AN OPPORTUNITY.
02:45PM MR. GIRARD: OKAY.
02:45PM THE COURT: OKAY. THERE'S A PROVISION IN THE
02:46PM SETTLEMENT AGREEMENT THAT SAYS THE NON-CASHED CHECKS GO TO
02:46PM EITHER A CY PRES RECIPIENT OR FOR FURTHER CLASS DISTRIBUTION,
02:46PM AND I WANTED TO GET A SENSE OF HOW THAT WAS LIKELY TO PROCEED.
02:46PM WOULD THERE BE A CERTAIN AMOUNT -- I MEAN, CERTAINLY IF IT'S A
02:46PM REALLY LARGE NUMBER, AT SOME POINT IT SHOULD GO TO THE CLASS
02:46PM FOR FURTHER DISTRIBUTION --
02:46PM MS. DERMODY: RIGHT.
02:46PM THE COURT: -- VERSUS GOING TO A CY PRES RECIPIENT.
02:46PM BUT HOW WERE YOU PLANNING TO APPROACH THAT QUESTION?
02:46PM MS. DERMODY: YOUR HONOR, CAN YOU DIRECT ME TO WHERE
02:46PM YOU ARE IN THE SETTLEMENT?
02:46PM THE COURT: YEAH, SURE.
02:46PM MS. DERMODY: I'D BE HAPPY TO TAKE A LOOK AT THAT

CLAUSE.

THE COURT: NO PROBLEM.

MS. DERMODY: OKAY.

THE COURT: I'M LOOKING AT -- ON PAGE 18 --

MS. DERMODY: THANK YOU.

THE COURT: -- IT'S PARAGRAPH 8 OF 4A IS THE SECTION.

MS. DERMODY: OH. YES, YOUR HONOR.

WE INTENDED TO COME BACK TO THE COURT SO THAT THE COURT WOULD EITHER BLESS THE APPROACH OF CY PRES, OR WE COULD HAVE A CONVERSATION WITH THE COURT TO DETERMINE WHETHER IT MADE SENSE FROM AN ECONOMIC STANDPOINT TO PAY FOR THE MAIL TO REDISTRIBUTE.

IT'S NOT EXPECTED, WITH THIS TYPE OF PROCESS, THAT WE WOULD HAVE THAT MUCH MONEY AT THE END OF THE DAY BECAUSE IT WOULD ONLY BE PEOPLE WHO RECEIVED CHECKS THAT THEY DIDN'T CASH, AND IN A TYPICAL CASE, THAT MIGHT BE $10,000 OR SOMETHING LIKE THAT, MAYBE EVEN $20,000.

BUT YOU DON'T TEND TO SEE A MILLION DOLLARS OF UNCASHED CHECKS. THAT WOULD BE VERY RARE.

THE COURT: SO IS YOUR THINKING ABOUT THIS QUESTION THAT IF IT TURNS OUT THAT THE AMOUNT IS EFFECTIVELY DE MINIMIS AND WOULDN'T ACTUALLY PAY FOR ITSELF IN TERMS OF THE ADMINISTRATIONS COSTS, TO THEN GIVE IT TO A CY PRES RECIPIENT?

MS. DERMODY: THAT'S RIGHT, YOUR HONOR.

THE COURT: BUT IF IT EXCEEDS THE COST OF

DISTRIBUTION AND ADMINISTRATION, THEN TO SEND IT TO THE CLASS?

MS. DERMODY: ABSOLUTELY, YES.

THE COURT: OKAY. ALL RIGHT. THAT'S FINE.

THIS DISPUTE FUND ISN'T DEFINED ANYWHERE AND IT'S NOT IN THE NOTICE. THIS IS PARAGRAPH 6 ON THE SAME PAGE.

MS. DERMODY: YES, YOUR HONOR.

THE COURT: I WAS UNCLEAR ON IS THIS FUND MONEY THAT GOES TO THE CLAIMS ADMINISTRATOR TO RESOLVE DISPUTES AND PAY FOR ADMINISTRATION COSTS? OR IS THIS SORT OF A FUND THAT WILL BE PAID TO ANY CLASS MEMBER WHO SUCCESSFULLY DISPUTES THEIR PAYMENT AMOUNT?

MS. DERMODY: THE LATTER, YOUR HONOR, YES. IT'S -- WITH THE -- IT'S JUST TO MAKE SURE THAT THERE'S MONEY LEFT OVER IN CASE THERE'S A CLASS MEMBER WHO EITHER HAS A RECORD KEEPING ISSUE WITH THE DATA AND BELIEVES, AND CORRECTLY BELIEVES, THAT HE OR SHE SHOULD HAVE HAD A HIGHER FORMULA PAY OUT, OR IF THERE IS A PERSON WHO, FOR SOME REASON, DOESN'T RECEIVE A CHECK AND THEY'RE IN THE CLASS DATA AND IT'S JUST A MISTAKE, EITHER ON THE ADMINISTRATOR'S STANDPOINT OR IN THE DEFENDANTS' DATA KEEPING OF PEOPLE IN THIS CLASS, THAT WE HAVE MONEY TO PAY THOSE FOLKS WHO MIGHT SHOW UP JUST AFTER CHECKS ARE ISSUED.

THE COURT: AND NEITHER THIS DISPUTE FUND NOR THE REVERTER OR THE CY PRES ISSUE ARE ACTUALLY IN THE NOTICE. WAS THERE A REASON WHY THOSE WEREN'T INCLUDED IN THERE?

MS. DERMODY: NO, YOUR HONOR. BUT WE CAN CERTAINLY

ADD THEM.

THE COURT: OKAY. IF I APPROVE THIS SETTLEMENT, I WOULD WANT IT TO BE ON A PRETTY TIGHT TIMEFRAME.

MS. DERMODY: YES.

THE COURT: AND THIS IS THE SCHEDULE I WOULD RECOMMEND AND I WANTED TO SEE IF THAT WOULD BE FEASIBLE FOR THE PARTIES AND FOR THE CLAIMS ADMINISTRATOR.

SO SUBMISSION OF REVISED NOTICE AND PROPOSED ORDER -- ACTUALLY, MOST LIKELY -- WE MAY JUST MAKE THE CHANGES OURSELVES TO THE NOTICE.

BUT -- I GUESS THE TRANSFERRING OF THE MATERIALS FROM THE PRIOR SETTLEMENT ADMINISTRATOR TO THE NEW ONE BY JUNE 30TH; NOTICE MAILED AND POSTED TO THE INTERNET, JULY 14TH.

MS. DERMODY: YOUR HONOR, I'M SORRY. CAN I STOP YOU ON THE VERY FIRST ONE?

THE COURT: YES. IS THAT TOO TIGHT?

MS. DERMODY: YES, I'M SORRY. HEFFLER AND GILARDI I THINK HAVE TALKED ABOUT 20 DAYS FROM THE ORDER. IF THE ORDER WAS TODAY, 20 DAYS WOULD BE JULY 9.

THE COURT: FOR, WHAT, THE TRANSFERRING OF MATERIALS?

MS. DERMODY: THE TRANSFER, YES.

THE COURT: OH. THEY NEED 20 DAYS?

MS. DERMODY: BECAUSE THERE'S SOME SECURITY ISSUES AROUND THE DATA. IT'S NOT SOMETHING THAT CAN BE DONE SIMPLY. I JUST WANT TO MAKE SURE THEY HAVE ENOUGH TIME TO DO IT

SECURELY AND THE RIGHT WAY.

THE COURT: ALL RIGHT. WELL, THEN, I ASSUME THAT THAT WOULD PUSH EVERYTHING ELSE BACK.

MS. DERMODY: THAT'S WHY I STOPPED YOUR HONOR. I'M SORRY.

THE COURT: OKAY. SO --

MS. DERMODY: IF IT WOULD HELP YOUR HONOR, I COULD GIVE YOU A LIST I WROTE OUT IF WE USED JULY 9.

THE COURT: WELL, WHAT IF THAT WOULD BE JULY 14TH? THAT WOULD BE THE DATE OF THE TRANSFER, ROUGHLY 20 DAYS FROM MONDAY, JUNE 23RD.

THEN HOW MUCH TIME WOULD YOU NEED TO MAIL THE NOTICE AND POST IT TO THE INTERNET?

MS. DERMODY: TWO WEEKS, YOUR HONOR. SO THAT WOULD BE JULY 28, AND THAT'S A MONDAY.

THE COURT: OKAY. AND THEN THE MOTION FOR ATTORNEYS' FEES AND COSTS, YOU'RE SAYING 31 DAYS FROM THE NOTICE DATE, SO THAT WOULD BE ROUGHLY --

MS. DERMODY: AUGUST 28.

THE COURT: THAT WOULD BE AUGUST 28 OF 2014.

OKAY. AND THEN I GUESS I'M UNCLEAR. SOME OF THE DATES ARE OFF THE -- THEY KIND OF SWITCH FROM THE NOTICE DATE BEING THE ANCHOR DATE TO THE FINAL APPROVAL HEARING BEING THE ANCHOR DATE.

MS. DERMODY: YES. I'M SORRY, YOUR HONOR.

02:52PM THE COURT: WHAT -- I GUESS FOR THE MOTION FOR FINAL
02:52PM APPROVAL, THAT WOULD BE 70 DAYS FROM THE NOTICE DATE, WHICH
02:53PM WOULD HAVE BEEN JULY 28.
02:53PM MS. DERMODY: SO IT MIGHT BE EASIER TO SET THE OPT
02:53PM OUT OBJECTION DEADLINE, WHICH I THINK UNDER THIS WOULD BE
02:53PM SEPTEMBER 11TH.
02:53PM AND THEN WE MIGHT WANT TO HAVE TWO WEEKS FOR THE OPENING
02:53PM BRIEF FOR FINAL APPROVAL, AND THAT WOULD THEN BE THREE WEEKS
02:53PM BEFORE THE HEARING DATE.
02:53PM THE COURT: YOU MEAN TWO WEEKS AFTER SEPTEMBER 11TH?
02:53PM MS. DERMODY: CORRECT. THANK YOU.
02:53PM (PAUSE IN PROCEEDINGS.)
02:53PM THE COURT: HOW MUCH TIME AFTER THE MOTION FOR FINAL
02:53PM APPROVAL IS NEEDED FOR THE CLAIMS ADMINISTER AFFIDAVIT OF
02:53PM COMPLIANCE WITH THE NOTICE REQUIREMENTS?
02:53PM MS. DERMODY: I THINK THAT THAT CAN BE 30 DAYS BEFORE
02:54PM THE FINAL APPROVAL HEARING, YOUR HONOR. SO IF THAT HEARING WAS
02:54PM ON OCTOBER 16, IT WOULD BE THE 30 DAYS BEFORE THAT. I THINK
02:54PM THAT WOULD BE SEPTEMBER 16.
02:54PM THE COURT: AND THE REPLIES WOULD BE?
02:54PM MS. DERMODY: A WEEK BEFORE THE HEARING IF THAT WORKS
02:54PM FOR YOUR HONOR.
02:54PM THE COURT: I NEED TO CHECK -- MS. PARKER BROWN, CAN
02:54PM YOU TAKE A LOOK AT OCTOBER 16?
02:54PM OR WE COULD DO IT EVEN SOONER, OCTOBER -- HOW -- WHAT IS

02:54PM THE EARLIEST DATE WE COULD DO IT THAT WOULD GIVE YOU ENOUGH
02:54PM TIME TO GET EVERYTHING DONE?
02:54PM MS. DERMODY: WELL, IF WE ARE FILING OUR OPENING
02:54PM FINAL APPROVAL BRIEF ON SEPTEMBER 25, AND IF THERE'S GOING TO
02:54PM BE ANY OBJECTOR BRIEFING THAT'S GOING TO FOLLOW THAT, THEN WE
02:54PM MIGHT ACTUALLY KIND OF HAVE TO HAVE A BRIEFING SCHEDULE OF
02:54PM SEPTEMBER 25, WITH THE EXPECTATION THAT SOMETHING GETS FILED BY
02:54PM OBJECTORS A WEEK LATER, AND WE REPLY TO THAT BY THE 9TH.
02:54PM SO THAT'S THE TROUBLE OF TRYING TO MOVE SOMETHING EARLIER
02:54PM THAN THE 16TH I THINK, YOUR HONOR.
02:55PM THE COURT: OKAY. SO THIS WOULD SAY THE REPLIES THEN
02:55PM WOULD BE DUE OCTOBER 9, AND THE HEARING DATE WILL THEN BE
02:55PM OCTOBER 16TH.
02:55PM THE CLERK: ON OCTOBER 16TH, WE CURRENTLY HAVE --
02:55PM YESTERDAY YOU SET DISPOSITIVE MOTIONS ON BRAZIL V. DOLE FOR THE
02:55PM 16TH.
02:55PM THE COURT: UM-HUM.
02:55PM (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
02:55PM CLERK.)
02:55PM MR. VAN NEST: YOUR HONOR, IN LIGHT OF THE PROBLEMS
02:55PM WE'VE HAD ON THESE EARLIER ONES JUST WITH PAPERWORK AND
02:55PM WHATNOT, I WOULD JUST SUGGEST MOVING IT BACK A WEEK OR TWO SO
02:55PM WE DON'T HAVE TO COME BACK AND MOVE IT AGAIN.
02:55PM THE COURT: YOU MEAN MOVE THE 16TH A WEEK?
02:55PM MR. VAN NEST: MOVE IT BACK A WEEK. THE NOTICES

02:55PM SLIP, THE NOTICES DON'T GET OUT, THE DATE IS NOT QUITE RIGHT.
02:55PM WE'VE HAD THIS HAPPEN. WE THINK WE'VE GOT IT CLEARED UP, BUT
02:55PM WE DON'T KNOW.
02:55PM WHY NOT GIVE OURSELVES AN EXTRA WEEK AND THEN WE HAVE SOME
02:56PM FLEXIBILITY?
02:56PM THE COURT: LET'S SEE WHAT WE HAVE ON THE 23RD AND
02:56PM THE 30TH.
02:56PM MR. VAN NEST: YEAH.
02:56PM (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
02:56PM CLERK.)
02:56PM THE COURT: WELL, NEITHER OF THOSE DATES ARE GREAT
02:56PM FOR US, BUT I'M HAPPY TO --
02:56PM THE CLERK: NOVEMBER 6TH MIGHT WORK.
02:56PM THE COURT: WHAT'S ON NOVEMBER 6TH?
02:56PM (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
02:56PM CLERK.)
02:56PM THE COURT: I -- YOU KNOW, IF I'M GOING TO APPROVE
02:57PM THIS, I DON'T WANT TO DELAY PAYMENT FURTHER THAN NECESSARY.
02:57PM YOU KNOW, I GUESS NOVEMBER 6TH IS PROBABLY SLIGHTLY
02:57PM BETTER, BUT I'M FINE WITH ALSO HAVING THIS ON THE 23RD OR THE
02:57PM 30TH.
02:57PM MR. VAN NEST: EITHER ONE IS FINE WITH US. ANY ONE
02:57PM OF THOSE THREE DATES IS FINE, YOUR HONOR.
02:57PM MS. DERMODY: SAME FOR US, YOUR HONOR.
02:57PM THE COURT: OKAY.

02:57PM (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
02:57PM CLERK.)
02:58PM THE COURT: I'LL GO AHEAD AND SET THIS ON
02:58PM NOVEMBER 6TH IF I'M GOING TO APPROVE IT, AND THAT WAY WE CAN
02:58PM EVEN BUILD IN A LITTLE TIME THROUGHOUT -- I ASSUME EVERYONE IS
02:58PM AVAILABLE ON THE 6TH? IS THAT DATE OKAY?
02:58PM MS. DERMODY: YES, YOUR HONOR.
02:58PM MR. VAN NEST: YES, YOUR HONOR.
02:58PM THE COURT: OKAY. I THINK THAT WAS IT. I MEAN,
02:59PM THERE ARE SOME NITS ON THE NOTICE, BUT I DON'T THINK THEY'RE
02:59PM IMPORTANT ENOUGH TO TAKE UP YOUR TIME.
02:59PM I'LL GIVE EVERYONE A LAST OPPORTUNITY TO BE HEARD, AND
02:59PM THEN WE'RE GOING TO TAKE A BREAK BEFORE I CALL MY LAST CASE.
02:59PM MR. GIRARD: FINAL COMMENTS, YOUR HONOR.
02:59PM THE COURT: OKAY.
02:59PM MR. GIRARD: ON THE AMOUNT THAT THE DEFENDANTS ARE
02:59PM PAYING, THE COURT REFERRED SEVERAL TIMES TO THE IMPLICIT, I
02:59PM THINK I'LL CALL IT MARKET SHARE, IMPLIED BY THE EARLIER
02:59PM SETTLEMENT, THE 20 MILLION, AND MR. VAN NEST POINTED TO 8
02:59PM PERCENT.
02:59PM THE COLLOQUY THAT OCCURRED BETWEEN THE COURT AND COUNSEL
02:59PM AT PRELIMINARY APPROVAL ON THE EARLIER SETTLEMENTS --
02:59PM THE COURT: UM-HUM.
02:59PM MR. GIRARD: -- WAS THAT THE AMOUNT BEING PAID,
03:00PM WHAT -- WHAT THE DISCUSSION WAS, WAS THAT THEY HAD 8 PERCENT OF

03:00PM THE WORK FORCE, BUT THE AMOUNT THEY PAID AMOUNTED TO 5 PERCENT
03:00PM OF THE TOTAL AMOUNT PAID.
03:00PM SO THE IMPLICIT NUMBER, IF YOU USE 20 PERCENT AS A
03:00PM BENCHMARK FOR THESE REMAINING DEFENDANTS, I COME UP WITH IS 400
03:00PM MILLION, SO WE WOULD BE 75 MILLION SHORT IF WE WERE USING THAT
03:00PM AS A BENCHMARK.
03:00PM AND THE REFERENCE IS THE TRANSCRIPT OF THE PRELIMINARY --
03:00PM PRELIMINARY APPROVAL HEARING AT PAGE 16, AND AT LINE 18,
03:00PM THERE'S A DISCUSSION BETWEEN MS. DERMODY AND YOUR HONOR IN
03:00PM WHICH THESE NUMBERS ARE BEING DISCUSSED AND THE 20 PERCENT --
03:00PM OR 20 MILLION AND HOW THAT REPRESENTS 8 PERCENT OF THE WORK
03:00PM FORCE NUMERICALLY, BUT 5 PERCENT FROM THE POINT OF VIEW OF THE
03:00PM AMOUNT THEY PAID IN RELATION TO THE TOTAL AMOUNT OF SALARIES
03:00PM PAID.
03:00PM SO TO THE EXTENT I HEARD THE COURT TO BE SAYING THIS
03:00PM NUMBER SEEMED LIGHT, I THINK THAT'S THE ANSWER.
03:01PM SECOND, THE DISTRICT COURT -- THE COURT MADE A NUMBER OF
03:01PM COMMENTS THAT, IN MY EXPERIENCE, THE COMMENTS HAVE BEEN PRETTY
03:01PM EFFECTIVE IN FOCUSSING THE MIND OF DECISION MAKERS ABOUT
03:01PM SETTLEMENT, AND IF THE COURT DECIDED NOT TO APPROVE THIS AT
03:01PM THIS STAGE AND SENT THE PARTIES BACK TO TRY AGAIN, I THINK
03:01PM YOU'VE MADE IT PRETTY CLEAR, AND I HAVE A SENSE FROM THE
03:01PM DISCUSSION WHERE THAT BENCHMARK IS, AND I HAVE A FEELING THAT
03:01PM THAT -- THAT THE COURT'S COMMENTS ARE GOING TO ELICIT A
03:01PM FAVORABLE RESPONSE. BUT THE ONLY WAY TO FIND THAT OUT IS TO

03:01PM TRY.
03:01PM A COMMENT ABOUT THE ROLE OF JUDGE PHILLIPS. I AGREE HE'S
03:01PM A HIGHLY RESPECTED MEDIATOR AND VERY WELL EXPERIENCED.
03:01PM HE WAS ALSO THE MEDIATOR IN THAT NFL CONCUSSION SETTLEMENT
03:01PM WE CITED TO THE COURT THAT JUDGE BRODY DECLINED TO
03:01PM PRELIMINARILY APPROVE AND HE, LIKE THIS CASE, HAD CONCLUDED
03:01PM THAT SETTLEMENT WAS FAIR.
03:01PM THE JUDGE DID NOT GRANT PRELIMINARY APPROVAL BECAUSE OF
03:01PM HER CONCERNS WITH THE AMOUNT OF THE RECOVERY, AND IT'S NOT
03:02PM BECAUSE JUDGE PHILLIPS WASN'T DOING HIS JOB. HIS JOB IS TO
03:02PM BRING THE PARTIES TOGETHER TO AGREE ON THE NUMBER.
03:02PM IT'S NOW THE JOB THIS COURT HAS TO DECIDE WHETHER THE
03:02PM SETTLEMENT IS FAIR OR NOT.
03:02PM SO I DON'T THINK IT'S ANY DETRACTION ON THE PERFORMANCE OF
03:02PM JUDGE PHILLIPS TO POINT OUT THAT THE FACT THAT A MEDIATOR
03:02PM BRINGS THE PARTIES TOGETHER DOESN'T MEAN THAT THE RESULTING
03:02PM SETTLEMENT WAS FAIR, AND THE COURTS HAVE NOT TREATED THE ROLE
03:02PM OF A MEDIATOR AS DISPOSITIVE ON THAT QUESTION.
03:02PM LAST POINT. IF YOU DO DECIDE TO GO FORWARD AND GRANT
03:02PM PRELIMINARY APPROVAL, OUR SUGGESTION WOULD BE THAT THE NOTICE
03:02PM INCLUDE THE NUMBERS THAT WE'VE BEEN DISCUSSING IN THE SENSE
03:02PM SPECIFICALLY OF THE POTENTIAL RECOVERY, THE RECOVERY PER
03:02PM PERSON, AND WHAT THE RECOVERY WOULD BE ON THE THEORY OF DAMAGE
03:02PM IF THE CASE WERE TO BE WON AT TRIAL SO THAT FROM THE
03:02PM PERSPECTIVE OF A CLASS MEMBER -- AND FINALLY, THE AMOUNT OF

03:02PM PERSONS IN THE CLASS -- SO THAT THE NUMBERS ARE RIGHT THERE AND
03:03PM SOMEBODY DOESN'T HAVE TO GO DO THE MATH, BECAUSE I THINK THE
03:03PM AVERAGE PERSON IS NOT GOING TO JUMP TO THE CONCLUSION THAT THEY
03:03PM CAN DO THAT MATH AND THAT THAT'S GOING TO BE HOW THEY KNOW.
03:03PM SO IT'S EASY ENOUGH TO DO THAT LANGUAGE. IF YOU APPROVE,
03:03PM I WOULD PROPOSE LANGUAGE TO CLASS COUNSEL. I'M SURE WE COULD
03:03PM AGREE ON AN INSERTION TO THE NOTICE THAT WOULD ADD THAT
03:03PM INFORMATION.
03:03PM AND SO IF YOU'RE GOING FORWARD, IT'S, I THINK, CONSISTENT
03:03PM WITH THE NORTHERN DISTRICT'S RECENT GUIDELINES. THOSE CALL FOR
03:03PM THIS INFORMATION IN THE MOVING PAPERS, AND A NUMBER OF COURTS
03:03PM HAVE REQUIRED THAT INFORMATION IN THE NOTICE. IT'S REQUIRED
03:03PM UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT, AND IT'S
03:03PM EASY ENOUGH TO DO FROM A PRACTICAL PERSPECTIVE.
03:03PM AND IF YOU WANT TO PROCEED WITH THIS SETTLEMENT, IT'S ONE
03:03PM WAY OF GIVING THE CLASS MEMBERS THE INFORMATION THAT MR. DEVINE
03:03PM WAS CONCERNED ABOUT.
03:03PM THE COURT: YOU MEAN PUTTING IN THE $141,331?
03:04PM MR. GIRARD: YEAH. AND TO THE EXTENT THE CONCERN IS
03:04PM THAT'S A TREBLED NUMBER, IT CAN BE CLARIFIED THAT THAT WOULD BE
03:04PM AFTER TREBLING.
03:04PM BUT I THINK, YEAH, THE SHORT ANSWER IS YES.
03:04PM THE COURT: WHY DON'T I HAVE MR. VAN NEST, WHY DON'T
03:04PM YOU RESPOND? I MEAN, IT IS TRUE THAT THE FIRST SETTLEMENT, THE
03:04PM PERCENTAGE OF THE CLASS COMPENSATION WAS 5 PERCENT, AND THE

03:04PM PERCENTAGE OF CLASS MEMBERSHIP WAS 8 PERCENT, AND IF WE DID
03:04PM THAT STRAIGHT CALCULATION, IT WOULD HAVE BEEN HIGHER.
03:04PM MR. VAN NEST: NO. THE NUMBER -- IT CONFIRMS
03:04PM ABSOLUTELY THAT THE SETTLEMENT IS RIGHT IN THE SWEET SPOT.
03:04PM IF 8 PERCENT IS THE BENCHMARK, AND THAT'S WHAT WE THOUGHT
03:04PM WAS FAIR AND WHAT WE ARGUED IN THE MEDIATION, THEN OUR SHARE OF
03:04PM THE SETTLEMENT WOULD HAVE BEEN 230 MILLION, BECAUSE IF 8
03:04PM PERCENT OF THE CLASS -- IF THOSE DEFENDANTS, EMPLOYING 8
03:04PM PERCENT, PAID 20 MILLION, THEN THE FULL VALUE OF THAT
03:04PM SETTLEMENT IS 250 MILLION, ABSOLUTELY.
03:05PM THE COURT: NO, NO, NO. THE PERCENTAGE -- OKAY, 8
03:05PM PERCENT. BUT WHY SHOULD YOU GET THE SAME DEAL --
03:05PM MR. VAN NEST: WE DIDN'T.
03:05PM THE COURT: -- AS THOSE --
03:05PM MR. VAN NEST: WE DIDN'T. WE GOT A DEAL THAT WAS 50
03:05PM PERCENT MORE EXPENSIVE.
03:05PM THE COURT: OKAY. LET ME HAVE MR. GIRARD -- OKAY.
03:05PM TELL ME AGAIN -- AND I'M SORRY I DIDN'T WORK OUT THE NUMBERS IN
03:05PM ADVANCE. I AGREE WITH YOU THE PERCENTAGE OF CLASS COMPENSATION
03:05PM WAS 5 PERCENT. THE PERCENTAGE OF CLASS MEMBERSHIP WAS 8
03:05PM PERCENT FOR THE INTUIT, LUCASFILM, PIXAR FILM.
03:05PM WHAT WOULD THE NUMBER HAVE BEEN? I'M SORRY I DIDN'T
03:05PM CALCULATE THIS IN ADVANCE.
03:05PM MR. GIRARD: SO I'M DOING THE SAME DIVISION THAT
03:05PM MR. VAN NEST IS DOING, BUT WITH 5 PERCENT INSTEAD OF 8 PERCENT,

03:05PM WHICH GIVES YOU 400 MILLION. SO WE'RE --
03:05PM THE COURT: OKAY. SO TELL ME WHAT YOU'RE DOING AND
03:05PM WHY YOU ALL ARE COMING OUT WITH DIFFERENT NUMBERS. GO AHEAD.
03:05PM MR. VAN NEST: NO, NO. WE'RE COMING OUT WITH THE
03:05PM SAME NUMBERS, YOUR HONOR.
03:05PM IF YOU LOOK AT IT AS 5 PERCENT OF THE COMPENSATION PAID --
03:05PM THE COURT: UM-HUM.
03:05PM MR. VAN NEST: -- IF THAT GROUP PAID 20, THEN THE
03:05PM TOTAL VALUE OF THAT IS 400.
03:05PM IF, HOWEVER, YOU LOOK AT IT AS 8 PERCENT OF THE CLASS THAT
03:05PM YOU EMPLOYED, THEN THE TOTAL SETTLEMENT IS 250.
03:06PM THIS NUMBER IS RIGHT IN THE MIDDLE OF THAT, WHICH IS WHY I
03:06PM SAY IT'S AN ABSOLUTELY FAIR NUMBER. IT'S -- YOU COULD LOOK AT
03:06PM IT ONE WAY OR THE OTHER. I THINK, AND I THINK THE DEFENDANTS
03:06PM BELIEVE, THE FAIR WAY TO LOOK AT IT IS, WHAT PERCENTAGE OF THE
03:06PM CLASS DID YOU FOLKS EMPLOY THAT PAID? AND WHO -- IF THAT'S --
03:06PM THAT'S A WAY TO DIVIDE IT UP.
03:06PM YOU COULD ALSO DIVIDE IT UP BASED ON THE PERCENTAGE OF
03:06PM PAY.
03:06PM BUT EITHER WAY YOU DO IT, THIS NUMBER IS RIGHT IN THE
03:06PM SWEET SPOT OF WHAT IS NOT ONLY FAIR, BUT IN MANY WAYS A PREMIUM
03:06PM OVER THE SETTLEMENT THAT YOUR HONOR APPROVED A COUPLE OF MONTHS
03:06PM AGO. THAT'S ALL.
03:06PM THE COURT: ALL RIGHT. LET ME HEAR FROM MR. GIRARD.
03:06PM WHY SHOULD IT BE A PERCENTAGE OF THE CLASS COMPENSATION VERSUS

03:06PM THE PERCENTAGE OF THE CLASS MEMBERSHIP?
03:06PM MR. GIRARD: BECAUSE DAMAGES ARE AWARDED BASED ON
03:06PM COMPENSATION, ONE.
03:06PM TWO, BECAUSE THE EARLIER SETTLEMENTS TYPICALLY ARE FIRST
03:06PM OUT SETTLEMENTS THAT ARE USED TO FUND THE LATER LITIGATION WITH
03:06PM THE UNDERSTANDING THAT LATER SETTLING DEFENDANTS ARE GOING TO
03:07PM PAY MORE.
03:07PM AS YOUR HONOR ACKNOWLEDGED, THESE DEFENDANTS WERE FACING A
03:07PM TRIAL. THE EARLIER DEFENDANTS SETTLED AT A TIME WHEN THERE WAS
03:07PM LESS RISK IN THE CASE.
03:07PM BUT EVEN IF IT'S A PURE APPLES TO APPLES COMPARISON, SINCE
03:07PM DAMAGES ARE AWARDED BASED ON COMPENSATION, THE BENCHMARK NUMBER
03:07PM IS 400, NOT THE NUMBER MR. VAN NEST SUGGESTED.
03:07PM THE COURT: BUT DO YOU AGREE WITH HIM, IF THE
03:07PM BENCHMARK WAS 8 PERCENT, THE NUMBER WOULD BE 250? DO YOU AGREE
03:07PM WITH HIM ON THAT?
03:07PM MR. GIRARD: WHATEVER THE MATH IS. I AGREE WITH HIM
03:07PM ON THE MATHEMATICAL CALCULATION, SO IF YOU USE THAT, YES.
03:07PM THE COURT: OKAY.
03:07PM MR. GIRARD: IT DOESN'T ADDRESS THE ARGUMENTS ABOUT
03:07PM THE HEIGHTENED RISK TO THE DEFENDANTS BECAUSE OF THE STAGE AT
03:07PM WHICH THEY'RE SETTLING AND THE FACT THAT THEY CHOSE TO PLAY ON
03:07PM THE HOPES THAT THEY WOULD GET OUT, THAT THEY WOULD GET THE
03:07PM CLASS CERTIFICATION ORDER REVERSED, DIDN'T GET THAT, AND
03:07PM TYPICALLY THEY PAY A PRICE FOR THAT BY HAVING TO PAY A HIGHER

03:07PM PERCENTAGE.
03:07PM MS. DERMODY: AND, YOUR HONOR, I JUST WANTED TO SAY
03:07PM THAT CLASS COUNSEL, AT THE START OF THIS HEARING, ACKNOWLEDGED
03:07PM THAT WHERE WE ARE RIGHT NOW IS PRICED IN A RATIO THAT'S VERY
03:07PM SIMILAR TO THE FIRST TIME AROUND AND THAT WE BASED OUR DECISION
03:08PM NOT ON THIS IDEA OF HAVING, YOU KNOW, EVEN MORE MONEY AND THIS
03:08PM IS WHY WE'RE TRYING TO SELL THIS TO THE COURT, BUT ON THIS RISK
03:08PM THAT WE THINK IS VERY REAL.
03:08PM YOU KNOW, WHEN WE HAD THE FIRST SETTLEMENT, AS THE COURT
03:08PM MAY RECALL, THE ONLY CORPORATE ADMISSIONS IN THIS CASE WERE
03:08PM FROM THE PIXAR/LUCAS CORPORATE EXECUTIVES. THOSE ARE THE -- IN
03:08PM SOME WAYS, THOSE WERE THE STRONGEST PIECES OF EVIDENCE IN THE
03:08PM CASE, AND THEY CASHED OUT.
03:08PM THERE WAS DIFFERENT EVIDENCE, SOME VERY GOOD EVIDENCE, BUT
03:08PM DIFFERENT TYPES OF EVIDENCE PUTTING TOGETHER THE PIECES WITH
03:08PM THE OTHER DEFENDANTS. SO YOU HAVE TO WEIGH SOME OF THOSE
03:08PM ISSUES AS WELL.
03:08PM AND I THINK, YOUR HONOR, THAT IF YOU WOULD TALK TO OUR
03:08PM TEAM ABOUT WHO HAS BEEN DRINKING THE KOOL-AID ON THIS CASE THE
03:08PM MOST, THEY PROBABLY WOULD NAME ME AS THAT PERSON WHO HAS BEEN
03:08PM ZEALOUS ABOUT TAKING THIS CASE TO TRIAL.
03:08PM BUT WHEN YOU GO THROUGH JURY TESTING AND YOU ACTUALLY SHOW
03:08PM JURORS IN THIS DISTRICT THIS EVIDENCE AND TEST WITH THEM THEIR
03:08PM ATTITUDES ABOUT THESE CLAIMS AND THESE CLASS MEMBERS, YOU HAVE
03:08PM TO BE SOBERED ABOUT WHAT THE RISKS ARE WITH THIS JURY POOL,

03:09PM WITH THIS EVIDENCE.
03:09PM IT IS NOT WITHOUT, YOU KNOW, GREAT CONCERN THAT WE WOULD
03:09PM EVER TAKE THIS CASE TO TRIAL, AND THAT'S WHY WE THINK THIS IS
03:09PM AN EXCELLENT DEAL AND IT WOULD BE WRONG FOR US NOT TO PRESENT
03:09PM IT TO THE CLASS.
03:09PM THE COURT: OKAY. BUT WHY -- I MEAN, I WAS THINKING
03:09PM OF THE 5 PERCENT, NOT THE 8 PERCENT. WHY SHOULDN'T YOU HAVE AT
03:09PM LEAST GOTTEN THE SAME COMPENSATION AS THE EARLIER CASE?
03:09PM YOU'RE SAYING BECAUSE YOUR CASE AGAINST THESE DEFENDANTS
03:09PM WAS WEAKER THAN YOUR CASE AGAINST LUCASFILM AND PIXAR? I FIND
03:09PM THAT KIND OF HARD CONSIDERING WHO THE KEY PEOPLE WERE, LIKE
03:09PM STEVE JOBS. YOU HAVE THE -- YOU HAVE MR. CAMPBELL WITH GOOGLE,
03:09PM YOU HAVE THE WHOLE FACEBOOK SOLICITATION, YOU HAVE THE
03:09PM SOLICITATION WITH EBAY. I MEAN, BOTH MR. CAMPBELL AND
03:09PM MR. SCHMIDT WERE INVOLVED IN THAT.
03:09PM I MEAN, I SEE WHAT YOU'RE SAYING. CERTAINLY THE QUOTES OF
03:09PM THE CEOS FOR LUCASFILM AND PIXAR WERE VERY GOOD FOR YOU.
03:10PM MS. DERMODY: ESPECIALLY ABOUT THEIR MOTIVATION FOR
03:10PM WHY THEY ENTERED INTO THE AGREEMENTS. THERE'S NO ONE ELSE WHO
03:10PM HAS SAID THE THINGS THAT THEY SAID.
03:10PM THE COURT: BUT I WOULD -- WELL, ANYWAY, YOU TELL ME.
03:10PM SO WHY DO THESE DEFENDANTS GET A DISCOUNT? BECAUSE YOU THINK
03:10PM YOUR CASE WAS WEAKER AGAINST STEVE JOBS?
03:10PM MS. DERMODY: I DON'T THINK THAT THEY GOT A DISCOUNT.
03:10PM THE COURT: YOU THINK YOUR CASE WAS WEAKER AGAINST

ERIC SCHMIDT?

MS. DERMODY: I THINK THE RATIO IS VERY SIMILAR IN TERMS OF WHAT HAPPENED BEFORE AND WHAT HAPPENED NOW. AND I UNDERSTAND. IT'S WHAT WE WRESTLED WITH OURSELVES ABOUT THIS SETTLEMENT, YOUR HONOR.

IT'S BECAUSE, AT THE END OF THE DAY, THE RISK OF LOSING AT TRIAL NEVER CHANGED.

AT THE END OF THE DAY, THE RISK OF LOSING CERTAIN PRETRIAL ORDERS ON APPEAL NEVER CHANGED.

THE COURT: YOU KNOW, I WISH YOU HAD TOLD ME HOW WEAK YOUR CASE WAS FOR CLASS CERT AND ON ALL THOSE DAUBERT MOTIONS. I MEAN, THAT WOULD HAVE BEEN HELPFUL INFORMATION.

I WAS CERTAINLY HEARING A DIFFERENT TUNE --

MS. DERMODY: I DON'T THINK YOU --

THE COURT: -- FROM YOUR SIDE OF THE COURTROOM DURING ALL THE PREVIOUS MOTIONS IN THIS CASE.

IF I HAD KNOWN WHAT A LOSER THIS WAS, PERHAPS, YOU KNOW -- THE COURT, YOU KNOW, DID 90-PAGE ORDERS.

MS. DERMODY: YOUR HONOR, I THINK WE'RE --

THE COURT: AND IF I HAD KNOWN WHAT A WEAK CASE THIS WAS, PERHAPS THIS SHOULDN'T HAVE GOTTEN AS MUCH OF THE COURT'S RESOURCES AS IT DID.

MS. DERMODY: BUT, YOUR HONOR, I THINK THAT --

THE COURT: YEAH.

MS. DERMODY: -- HOW THE COURT FEELS ABOUT IT IS

MAYBE, I THINK, IN FAIRNESS, NOT LOOKING AT THE FULL PICTURE.

THE COURT: OKAY.

MS. DERMODY: THIS HONESTLY IS ONE OF THE BIGGEST SETTLEMENTS, ONE OF THE BIGGEST RESULTS EVER IN A CASE LIKE THIS. IT IS THE SINGLE BIGGEST RESULT EVER IN AN ANTITRUST EMPLOYMENT CASE, EVER, BY FAR, ON AN AGGREGATE BASIS OR ON A PER CAPITA CLASS MEMBER BASIS.

IT IS A HUGE RESULT BY EXPONENTIALLY MORE THAN OTHER RESULTS THAT HAVE BEEN ACHIEVED, INCLUDING THE EBAY/INTUIT AGREEMENT, AND YOUR HONOR DOES KNOW A LOT ABOUT THAT ONE, IN THIS DISTRICT.

ALSO, IN THE EMPLOYMENT CLASS ACTION WORLD, THERE HAVE BEEN TONS OF EMPLOYMENT CLASS ACTIONS. THERE IS ONLY ONE THAT HAD A GREATER RESULT THAN THIS. IT TOOK 23 YEARS AGAINST THE U.S. GOVERNMENT.

THIS IS A HUGE ACHIEVEMENT. IT'S VERY SUBSTANTIAL. IT MAY FEEL LIKE IT'S NOT THE WHOLE THING, THAT WE COULD HAVE GOTTEN MORE.

AND, YES, I THINK IN EVERY SETTLEMENT, IT'S THE VIRTUE OF SETTLING IS YOU'RE COMPROMISING WHAT WAS POSSIBLE.

THE COURT: BUT ANSWER MY QUESTION. DO YOU BELIEVE YOUR CASE WAS WEAKER AGAINST GOOGLE, APPLE, ADOBE, AND INTEL THAN AGAINST LUCASFILM, PIXAR, AND INTUIT?

MS. DERMODY: NO.

THE COURT: BECAUSE THEY PAID A HIGHER PROPORTION OF

THEIR LIABILITY --

MS. DERMODY: THIS IS --

THE COURT: -- AND THEY SETTLED EARLY.

MS. DERMODY: RIGHT. THIS IS THE MARKET TESTING, YOUR HONOR.

THE COURT: OKAY.

MS. DERMODY: WHEN YOU HAVE JURORS LOOKING AT EVIDENCE, JURORS THINK VERY HIGHLY OF WHAT PEOPLE SAY AS ADMISSIONS. THEY DON'T NEED TO CONNECT ANY DOTS. THEY CAN TAKE IT AT FACE VALUE BECAUSE A PERSON SAID IT.

AND SO FROM A JUROR PERSPECTIVE, THERE ARE CERTAIN TYPES OF EVIDENCE THAT ARE, THAT ARE VERY HOT. THEY'RE TOXIC, YOU KNOW? THEY'RE -- THEY'RE ATOMIC.

AND THERE ARE OTHER TYPES OF EVIDENCE THAT REQUIRE LEAPS OF LOGIC AND CONNECTING DOTS AND YOU HAVE TO HAVE JURORS THAT ARE WILLING TO ROLL UP THEIR SLEEVES AND REALLY PUT THOSE DOTS TOGETHER IN ORDER TO UNDERSTAND.

AND YOU MIGHT NOT GET THE JURORS THAT DO THE LATTER, BUT YOU MIGHT GET JURORS THAT DO THE FORMER ALL DAY LONG BECAUSE IT'S QUITE SIMPLE TO DO.

AND SO FROM A JUROR PERSPECTIVE, I DON'T KNOW IF I COULD SAY THAT IT WAS STRONGER WITH THE LUCASFILM AND PIXAR -- I DON'T KNOW THAT I WOULD SAY THAT.

BUT I WOULD SAY THAT SOME OF THE EVIDENCE WAS MUCH EASIER FOR THEM, MUCH MORE ACCESSIBLE FOR THEM, AND IN THAT WAY, WE

HAD TO FIGURE OUT WHAT WOULD BE THE REACTION IN COMPARISON TO THAT EVIDENCE WITH SOME OF THE OTHER DEFENDANTS.

IT IS A RISK, YOUR HONOR. IT'S A RISK WE HAD TO ACKNOWLEDGE.

THE COURT: BECAUSE THE DOCUMENTARY EVIDENCE IN TERMS OF E-MAILS I THINK WAS STRONGER AGAINST THESE DEFENDANTS THAN AGAINST LUCASFILM AND PIXAR, EVEN IF THEIR CEO STATEMENTS WERE MORE INFLAMMATORY.

MS. DERMODY: THERE WAS A TREMENDOUS RECORD IN THIS CASE, YOUR HONOR, ABSOLUTELY.

AND IF I PERSONALLY BELIEVED THAT I COULD GO TO TRIAL RIGHT NOW AND DO BETTER THAN WHAT WE'RE GIVING TO YOUR HONOR TODAY, I WOULD DO IT. I WOULD DO IT A HUNDRED TIMES IN A ROW.

THE REASON WE'RE COMING HERE TODAY, YOUR HONOR, IS BECAUSE, IN OUR BEST JUDGMENT, THIS IS THE RIGHT THING TO DO FOR THIS CLASS. IF WE DIDN'T THINK THAT, WE WOULD NOT BE HERE BEFORE YOU.

MR. VAN NEST: YOUR HONOR, COULD I MAKE ONE OTHER COMMENT?

THE COURT: YEAH. I MEAN, YOU KNOW, THE RATIONALE GIVEN IN THE BRIEFS IS, OH, THIS SAVES COURT RESOURCES. WELL, YOU'VE ALREADY SPENT THIS COURT'S RESOURCES. THAT IS NOT A RATIONALE.

THIS NEEDS TO BE THE FAIREST COMPENSATION, YOU KNOW, A FAIR RESOLUTION FOR THE CLASS. THIS COURT WAS COMPLETELY

PREPARED TO GO TO TRIAL ON THIS CASE.

SO WHEN I HEAR, "OH, BUT WE SAVED YOU TIME," I'M SORRY, THAT'S NOT COMPELLING TO ME. THAT'S NOT A GOOD REASON TO ADOPT THIS. IT'S IN THE MOTION, IT'S IN THE REPLY, AND IT'S NOT PERSUASIVE.

BUT GO AHEAD.

MR. VAN NEST: TWO OTHER POINTS.

YOUR HONOR, YOU TALK ABOUT WEIGHING EVIDENCE.

THE COURT: YEAH.

MR. VAN NEST: TWO THINGS. REMEMBER THAT THE EARLIER PARTIES THAT SETTLED WERE PAYING GENERALLY LOWER SALARIES. THE PARTIES THAT ARE SETTLING HERE, PARTICULARLY GOOGLE AND APPLE, WERE AT THE VERY TOP OF THE MARKET.

ALSO, LIKE I SAY --

THE COURT: BUT WHICH WAY DOES THAT CUT?

MR. VAN NEST: IT CUTS --

THE COURT: WHICH WAY DOES THAT CUT?

MR. VAN NEST: FOR JURORS --

THE COURT: I MEAN, THAT MEANS THAT THE EMPLOYEES COULD POTENTIALLY HAVE EARNED EVEN MORE AND YOU SHOULDN'T BE PAYING LESS THAN YOUR PROPORTION THAN LUCASFILM AND PIXAR.

MR. VAN NEST: IT CUTS IN THIS WAY: PEOPLE DO NOT FEEL AS THOUGH THOSE EMPLOYEES WERE TREATED UNFAIRLY WHEN THEIR PAY WAS 50 OR MORE PERCENT HIGHER THAN THE AVERAGE TECH WORKER.

IT'S HARD TO GET A JUROR TO AGREE THAT THAT'S

UNDERCOMPENSATION WHEN THOSE FOLKS ARE MAKING SUCH A PREMIUM OVER EVERYBODY ELSE IN THE BUSINESS. THAT'S ONE THING.

THE OTHER KEY FACT IS THAT INTEL EMPLOYED 60 PERCENT OF THE CLASS. SO 60 PERCENT OF THE CLASS -- YOUR HONOR KNOWS THIS FROM THE EARLIER BRIEFING. THE EVIDENCE AGAINST INTEL WAS RELATIVELY THIN, RIGHT? ONE BILATERAL AGREEMENT, VERY LITTLE E-MAIL TRAFFIC. THAT WASN'T THE BARN BURNER OF THE CASE.

THE CASE THAT YOUR HONOR SAW EARLIER WITH COMMENTS BY MR. CATMULL AND MR. LUCAS AND OTHERS WHERE THEY WERE INDICATING THEY WANTED TO SUPPRESS PAY, THERE WAS NONE OF THAT IN THIS GROUP OF FOUR.

AND IN PARTICULAR WITH RESPECT TO INTEL WHERE THERE WAS ONLY A SINGLE AGREEMENT WITH A COMPANY THAT IT WAS DOING A LOT OF BUSINESS WITH, I DO THINK THERE'S A REAL QUESTION --

THE COURT: RIGHT, OKAY. BUT THERE WAS MR. SCHMIDT'S TESTIMONY AND SERGEY BRIN'S TESTIMONY THAT MR. OTELLINI OF INTEL KNEW ABOUT THE APPLE/GOOGLE AGREEMENT, RIGHT?

MR. VAN NEST: BUT --

THE COURT: I MEAN, THERE WAS CERTAINLY EVIDENCE. INTEL'S OWN EXPERT TESTIFIED THAT MR. OTELLINI WAS LIKELY AWARE OF GOOGLE'S OTHER BILATERAL AGREEMENTS BY VIRTUE OF MR. OTELLINI'S MEMBERSHIP ON GOOGLE'S BOARD.

I MEAN, I THINK THERE WAS -- INTEL CONCEDES THAT MR. OTELLINI KNEW THE CONTENTS OF GOOGLE'S DO NOT COLD CALL LIST, WHICH INCLUDED APPLE AND INTEL.

I MEAN, I --

MR. VAN NEST: BUT, AGAIN --

THE COURT: I THINK THERE WAS CERTAINLY EVIDENCE THAT THE PLAINTIFFS COULD POINT TO THAT INTEL WAS AWARE OF OTHER DEFENDANTS' AGREEMENTS AND THE COLD CALL AGREEMENTS OF OTHER COMPANIES THAT INCLUDED OTHER COMPANIES, EVEN IF THEY DIDN'T HAVE A DIRECT BILATERAL AGREEMENT WITH INTEL.

MR. VAN NEST: BUT, YOUR HONOR, THE ARGUMENT IS, IS IT A FAIR SETTLEMENT? WE'RE TALKING ABOUT $324 MILLION. THAT'S ALL PRICED INTO THAT.

AND YOU HAVE MR. DEVINE SAYING, "WELL, IT SHOULD HAVE BEEN A LITTLE BIT MORE." BALONEY. THAT'S ALL WITHIN THE RANGE OF JUDGMENT AND THE RANGE OF EXPERIENCE AND THE RANGE OF RISK.

IT'S NOT AS THOUGH WE'RE LOOKING AT A 15 OR $20 MILLION SETTLEMENT. WE'RE LOOKING AT A $324 MILLION SETTLEMENT WHICH, NO MATTER HOW YOU CALCULATE IS, IS MANY, MANY FACTORS HIGHER THAN WHAT THE EARLIER GUYS SETTLED FOR.

SO THIS IS ALL WITHIN THE RANGE OF DISCRETION AND JUDGMENT. THAT'S WHY I THINK THIS IS NOT A CLOSE CALL MYSELF GIVEN THE RISKS ON BOTH SIDES, GIVEN THE AMOUNT OF MONEY THAT WAS ACHIEVED, GIVEN THE --

THE COURT: OKAY. BUT LET ME ASK YOU, IF YOU USE THE 5 PERCENT, THEN THIS IS ABOUT 76,000 -- 76 MILLION SHORT. WHAT IS THAT?

MR. VAN NEST: WHY WOULD --

THE COURT: DO YOU AGREE WITH THE PLAINTIFFS THAT THEIR CASE AGAINST YOU WAS WEAKER THAN THE CASE AGAINST LUCASFILM AND PIXAR? OR WHAT'S YOUR VIEW?

MR. VAN NEST: I DON'T THINK IT'S --

THE COURT: NO, I'M JUST SAYING -- I UNDERSTAND YOUR POINT THAT IF YOU USE THE PERCENTAGE OF CLASS MEMBERSHIP, THIS LOOKS LIKE IT'S A NEGOTIATED AMOUNT.

MR. VAN NEST: EVEN --

THE COURT: BUT JUST --

MR. VAN NEST: LET'S USE YOUR NUMBER.

THE COURT: -- LOOKING AT THE 5 PERCENT.

MR. VAN NEST: LET'S USE YOUR NUMBER. IT'S A QUESTION OF JUDGMENT. YOU CAN'T JUST MULTIPLY THE NUMBER OUT. IT'S A QUESTION -- YOU'VE GOT A LOT MORE MONEY AT STAKE. THEY HAS A SETTLEMENT OF $20 MILLION.

THE COURT: OKAY. THAT'S WHY I WANTED TO KNOW, WHAT IS IT THAT MAKES A DIFFERENCE?

MR. VAN NEST: WHAT MAKES IT --

THE COURT: IS IT BECAUSE WE'RE TALKING ABOUT LARGER AMOUNTS OF MONEY? IS THAT SORT OF THE LOWER PERCENTAGE OR WHAT IS IT?

MR. VAN NEST: IT'S ONE THING TO RISK 20 MILLION.

THE COURT: OKAY.

MR. VAN NEST: IT'S ANOTHER TO RISK 324 MILLION. THAT'S A MUCH BIGGER RISK, RIGHT? I MEAN, JUST FROM THEIR

03:19PM STANDPOINT OF COMPENSATING THE CLASS --
THE COURT: OKAY.
MR. VAN NEST: -- IT'S ONE THING TO SAY, "OKAY, I'M GOING TO FORGO 20 MILLION AND TAKE MY SHOT."
IT'S QUITE ANOTHER THING TO SAY, "I'LL FORGO 324 MILLION AND TAKE MY SHOT." I MEAN, THAT IS A VASTLY DIFFERENT QUESTION.
AND, YES, THE EVIDENCE IS DIFFERENT IN THE TWO CASES AND, YES, WE CAN ALL DISAGREE ABOUT WHAT IT MEANS.
BUT ULTIMATELY NONE OF THAT MATTERS BECAUSE IT'S A HUGE RISK, ONE WAY OR THE OTHER, THAT THE JURY SEES IT YOUR WAY, AND IF THEY DON'T, YOU HAVE SQUANDERED $324 MILLION, WHICH IS NOW A SURE THING, YOU KNOW, IF THE SETTLEMENT WERE TO BE APPROVED.
SO I DON'T -- I DON'T, FOR ONE MINUTE, THINK THE DIFFERENCE BETWEEN 400 AND 324 IS MEANINGFUL, I DON'T, BECAUSE THIS IS ALL WITHIN THE RANGE OF JUDGMENT.
YOU CAN'T JUST TAKE A RULER AND MULTIPLY IT OUT AND SAY YOU'RE FALLING SHORT.
AND EVEN IF YOU DID THAT, IF YOU USE MY RULER, WE'RE PAYING A PREMIUM. IF YOU USE THEIR RULER, WE'RE PAYING LESS.
03:20PM BUT IT'S ALL WITHIN THE RANGE OF A REASONABLE RECOVERY FOR THE CLASS IN LIGHT OF ALL OF THE VARIOUS RISKS. THAT'S WHAT IT IS.
SO I DON'T THINK YOU WOULD REACH A DIFFERENT RESULT EVEN IF YOU SAID, "I THINK THE FAIR WAY TO LOOK AT IT IS BASED ON

03:20PM PAY, 5 PERCENT."
I STILL THINK THIS IS EASILY WITHIN THE RANGE OF A REASONABLE RESULT GIVEN EVERYTHING WE'VE TALKED ABOUT.
YOUR HONOR AND I COULD DEBATE ALL DAY HOW THE EVIDENCE COMES OUT, BUT YOU AND I BOTH KNOW, IT'S THE JURY THAT DECIDES, AND THAT'S VERY HARD TO PREDICT, VERY HARD TO PREDICT.
AND I WOULDN'T, IN A MILLION YEARS, IF I WERE IN THEIR SHOES, RISK $324 MILLION ON WHAT I THOUGHT A JURY OF EIGHT PEOPLE WAS GOING TO DO IN A CASE LIKE THIS WITH SO MUCH DISPARATE EVIDENCE AND SO MANY DIFFERENT FACETS.
THAT'S, I THINK, THE KEY TAKE AWAY. IT'S A MUCH, MUCH BIGGER RISK FOR THE CLASS.
MY ONLY OTHER COMMENT IS I DON'T THINK WE SHOULD BE GETTING INTO PUTTING NUMBERS INTO THE NOTICE OF WHAT THE CLASS COULD HAVE WON, I MEAN, BECAUSE THAT IS SO SPECULATIVE.
03:21PM THE COURT: I'M NOT GOING TO DO THAT.
MR. VAN NEST: YEAH. THANK YOU.
THE COURT: ALL RIGHT.
OKAY. DO YOU WANT TO HAVE THE LAST WORD?
MS. DERMODY: I JUST WANT TO MAKE IT CLEAR ON THE RECORD, YOUR HONOR, THAT EVERYTHING I'VE BEEN TALKING ABOUT TODAY IS ABOUT RISK ASSESSMENT AND IT'S NOT ABOUT THE PLAINTIFFS' FEELING ABOUT THE CASE BEING A WEAK CASE OR TRYING TO TELL YOUR HONOR THIS WAS A DOG AND ALL OF THAT.
THE COURT: AND WHY WE WASTED YEARS ON THIS CASE.

03:21PM MS. DERMODY: NO. IT'S US SAYING TO YOUR HONOR, WE HAVE BEEN DRIVING THIS TRAIN AND WE RAN INTO JURY WORK, AND WE HAVE BEEN SOBERED BY DOING THAT WORK AND BY LEARNING HOW DIFFICULT IT IS TO CONVINCE A UNANIMOUS ROOM OF PEOPLE, EVEN WITH THIS EVIDENCE, TO MEET THE STANDARD IN THIS CASE.
AND SO WHAT -- COULD WE HAVE DONE IT? IS IT POSSIBLE?
THE COURT: WERE YOU DOING RULE OF REASON OR WERE YOU DOING PER SE IN YOUR JURY STUDIES?
03:22PM MS. DERMODY: WE WERE DOING EVERYTHING IN THE MOST FAVORABLE WAY TO US, INCLUDING THINGS LIKE TELLING THE JURY ABOUT THE D.O.J. INVESTIGATION.
I MEAN, YOUR HONOR, I JUST -- YOU KNOW, THE RISK THAT --
THE COURT: I WOULD HAVE ALLOWED THAT PROBABLY.
PROBABLY.
MS. DERMODY: WELL, AT THE RISK OF EXPOSING A LOT OF WORK PRODUCT THAT WE WOULD NOT WANT THE DEFENDANTS TO HAVE IF THE COURT WAS TO DENY OUR REQUEST TO APPROVE THE SETTLEMENT, I DO WANT THE COURT TO UNDERSTAND THE AMOUNT OF CONCERN AND EFFORT AND THE EMPIRICAL WORK WE DID TO GET TO A PLACE WHERE WE RECOGNIZE THAT THAT RISK WAS NOT THEORETICAL, THAT IT WAS REAL, AND WE HAD TO AT LEAST ACKNOWLEDGE IT.
THE COURT: OKAY. ALL RIGHT. THANK YOU ALL VERY MUCH.
MR. VAN NEST: THANK YOU, YOUR HONOR.
THE COURT: LET'S TAKE A BREAK BEFORE THE LAST CASE.

03:22PM THANK YOU FOR YOUR PATIENCE FOR THE LAST CASE.
MS. DERMODY: THANK YOU, YOUR HONOR.
(THE PROCEEDINGS WERE CONCLUDED AT 3:22 P.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

_____
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JUNE 24, 2014